

**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**DOCKETED**

**No. 55**

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**PENNSYLVANIA RAILROAD COMPANY AND  
BROTHERHOOD OF RAILROAD TRAINMEN,  
PETITIONERS.**

**N. P. BYCHLIK INDIVIDUALLY AND ON BEHALF  
OF AND AS REPRESENTATIVE OF OTHER  
EMPLOYEES OF THE PENNSYLVANIA RAIL-  
ROAD**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**WRITING FOR CERTIORARI FILED APRIL 4, 1935**

**CERTIORARI GRANTED MAY 14, 1935**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 56

PENNSYLVANIA RAILROAD COMPANY AND  
BROTHERHOOD OF RAILROAD TRAINMEN,  
PETITIONERS,

vs.

N. P. RYCHLIK, INDIVIDUALLY AND ON BEHALF  
OF AND AS REPRESENTATIVE OF OTHER  
EMPLOYEES OF THE PENNSYLVANIA RAIL-  
ROAD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1956



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[fol. 1]

**UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK**

**N. P. RYCHLIK**, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad,

vs.

**U. D. HARTMAN**, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen; **H. F. SITES**, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen; **S. G. GAILEY**, individually and as a member on behalf of and as representative of the Brotherhood of Railroad Trainmen, and **THE PENNSYLVANIA RAILROAD COMPANY**, a corporation.

**BROTHERHOOD OF RAILROAD TRAINMEN**, Party Defendant.

Civil Action No. 23709

**DOCKET ENTRIES**

1955

January 28. Filed complaint

January 28. Filed and entered order to show cause why defts. should not be restrained—ret. Feb. 3/55—adj. Feb. 8—Decision reserved—no issuance of summons—letter of Atty.

January 28. Initial docket report made up

January 31. Filed marshal's return on service of complaint & order to show cause—served Jan. 31/55—Pa. RR. Co.

February 7. Filed marshal's return—served S. G. Gailey  
Feb. 2/55

February 16. Filed marshal's return—no service on H. F. Sites

February 23. Filed Opinion, Knight, J,  
[fol. 2] March 1. Filed & entered order granting injunction pending appeal—Knight, J. (Notice & copy mailed Mr. Tillou & Mr. Adams)

March 2. Filed & entered order vacating injunction pending appeal & Knight, J. (Notice & copy mailed Mr. Tillou & Mr. Fix)

- March 2. Filed motion for dismissal of complaint
- March 2. Filed & entered order permitting Brotherhood of RR. Trainmen to intervene as parties deft.—Knight, J. (Notice & copy mailed Mr. Fix & Mr. Adams—Mar. 4/55)
- March 4. Filed & entered order dismissing complaint—Knight, J. (Notice & copy mailed Mr. Fix & Mr. Adams)
- March 4. Final docket report made up
- March 18. Filed notice of hearing for reconsideration—ret. Mar. 21/55
- March 18. Filed motion for reconsideration to vacate judgment & leave to file amended complaint—ret. Mar. 21—Decision reserved
- March 29. Filed Opinion, Knight, J.—denying above motion
- April 1. Filed notice of appeal—copy sent Adams, etc. & Mr. Tillou
- April 1. Filed bond for costs on appeal
- April 1. Filed affidavit of W. E. Conrad
- May 9. Filed affidavit & order extending time to file record on appeal to June 30/55, entered order—Burke, J. (Notice & copy mailed Mr. Adams & Mr. Tilou—5/10/55)
- May 13. Filed & entered order denying plttf's motion for reconsideration to dismiss complaint & file amended complaint—Burke, J. (Notice & copy mailed Mr. Fix & Mr. Adams)
- June 22. Filed testimony
- June 22. Filed stipulation re contents of record on appeal
- June 24. Original pertinent papers & Clerk's certificate mailed Clerk, CCA

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[fol. 3] UNITED STATES DISTRICT COURT WESTERN DISTRICT  
OF NEW YORK

[Title omitted]

COMPLAINT—Filed January 28, 1955

Plaintiff complains of the defendants and each of them and for cause of action alleges that:

1. The plaintiff is an employee of the defendant, the Pennsylvania Railroad Company, and has been employed as an operating employee by the defendant Company for a period of more than two years and was employed until January 14, 1955, as a Trainman on its railroad lines, principally on its lines running out of Buffalo, New York; plaintiff also complains as an employee of and on behalf of and as a representative of other employees of the Pennsylvania Railroad Company, who are so numerous that it is impracticable for them to appear before the Court, not herein specifically named and set out as individual plaintiffs, or as employees, and as representing many of the employees of the said Pennsylvania Railroad Company, who are too numerous to be set forth herein, as parties plaintiff, as a class in this action, all of whom have a vital and great interest in this cause of action, and who are greatly affected and concerned in all of the facts alleged below.

2. The Brotherhood of Railroad Trainmen (hereinafter referred to as B.R.T.) is a labor organization, certified under the Railway Labor Act, to represent operating employees of the said Pennsylvania Railroad Company, employed as brakemen and conductors on its railroad lines, with offices in the City of Cleveland, State of Ohio, and with Local Unions in many States of the country, including Local No. 556, in the City of Buffalo, State of New York; the defendants, U. D. Hartman, H. F. Sites and J. E. McFarland, are members of the said B.R.T. and of the said Local No. 556.

3. In addition to the individual defendants named herein, all the members of the aforesaid B.R.T. are so numerous that it is impracticable and impossible to bring all of them before the Court; that all other members of the aforesaid B.R.T. not herein specifically named and set out as individual defendants or as members of and as representing all of the members of the said Labor Organization and who are too numerous to be set forth herein, as well as all the officers, agents, servants and employees of the aforesaid Labor Organization, are hereby made parties defendant as a class in this action; that the defendants, U. D. Hartman, H. F. Sites and J. E. McFarland are named defend-



ants in their individual capacities and as members of and as representing all of the members of the aforesaid B.R.T., and have been joined as parties defendant herein in their aforesaid representative capacities to defend this cause for and on behalf of all the members of the B.R.T.

[fol. 5] 4. The defendant, the Pennsylvania Railroad Company, is a Pennsylvania Corporation, maintaining railroad lines in several States including the State of New York and the County of Erie, and is engaged in the business of interstate carrying of freight and passengers, and employs the plaintiff and his fellow employees associated with him in this action as operating employees.

5. The plaintiff and other employees of the defendant Company, during the year 1953, allowed their membership in their Labor Organization to lapse, and were cited by the defendant Labor Organization for non-membership; the plaintiff and his fellow employees have since applied for reinstatement in the defendant Labor Organization, which covers their type of employment.

6. That jurisdiction is founded upon interpretation of the Railway Labor Act, so-called, U. S. Code Title 45, Chap. 8, diversity of the residences of the parties, and that the matter in controversy exceeds exclusive of interests and costs, the sum of \$3,000.00.

7. The defendant Labor Organization has refused to reinstate the plaintiff and his fellow employees, and has voted to deny them membership, regardless of their application for membership or reinstatement.

8. The defendant Labor Organization and the individual defendants have forced the defendant Company to discharge the plaintiff and his fellow employees, to the great damage and irreparable injury of the plaintiff and his fellow employees, although the defendant Labor Organization has voted to deny them membership, despite plaintiff and his fellow employees pursuance of every method available to them to gain admittance, in violation of the Railway Labor Act, U. S. Code Title 45, Chap. 8.

[fol. 6] 9. The defendant Labor Organization has denied the plaintiff and his fellow employees reinstatement and membership in the said organization, and caused their discharge for such lack of membership in said organization

contrary to the Railway Labor Act, supra, which provides in Section 2, Eleventh:

A. That membership in the labor organization cannot be required as a condition of continual employment,

"with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than failure of the employee to tender the periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership."

The plaintiff and his fellow employees, despite the expressed provisions of the Railway Labor Act, supra, have received telephone notice of discharge from the defendant Company.

10. That the plaintiff is in fact a member of the Switchmen's Union of North America, a union uniformly recognized to be national in scope and has been a member in good standing since July 31, 1954. That because of such membership the plaintiff came within the terms of the Railway Labor Act, supra, which states in Section 2, Eleventh:

"(c) That requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph 1 be satisfied, as to both a present or future employer in engine, train, yard, or hostling service, that is, an employer engaged in any of the services or capacities covered in the First division of subsection (h) of Section 153 of this Title, define the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of craft or class in any of said services; . . ."

[fol. 7] That the said plaintiff has complied with the above quoted provisions, in that he is a member in good standing of the Switchmen's Union of North America, and that de-

spite this fact, and with full knowledge of this fact, the defendant Company, upon the insistence of the defendant representatives of the B.R.T., has terminated the plaintiff's employment.

11. The defendant Labor Organization and the individual defendants named above have entered into an unlawful and illegal combination and conspiracy among themselves and others acting in concert with them for the following purposes:

To compel the defendant Company to discharge the plaintiff and his fellow employees in violation of their rights under the Railway Labor Act;

To cause the discharge of the plaintiff and his fellow employees for non-membership in the B.R.T. when such membership is denied in violation of the Railway Labor Act.

12. By reason of the aforesaid unlawful conduct of the said defendants, the plaintiff and his fellow employees will be deprived of their employment and greatly injured to their excessive loss in excess of the sum of \$3,000.00 each.

13. The commission of the said unlawful actions has resulted in substantial and irreparable injury to the plaintiff and his fellow employees, and prevented them from earning their livelihood, and the granting of necessary relief herein prayed for will inflict no injury on the defendants.

14. The plaintiff and his fellow employees have no adequate remedy at law by which the defendant can be immediately stopped from preventing the plaintiff and his fellow employees from earning their livelihood. The public officers charged with the duty of protecting the rights of the plaintiff and his fellow employees are unable to provide the needed protection as there is no open breach of the peace or law, of which the public officers can take notice, unless directed by the Court.

[fol. 8] 15. Unless a temporary restraining order shall be issued without notice, substantial and irreparable injury to the rights of the plaintiff and his fellow employees will continue.

16. The plaintiff and his fellow employees have complied with all obligations imposed by the law in that they have made tender of membership dues, which tender was unlaw-

fully refused, and they have made every reasonable effort to settle the dispute involved in this action.

17. The plaintiff and his fellow employees were unable to make application to the Court to restrain their unlawful discharge before said discharge took place, since they were first notified of said discharge by telephone, and thus had no cognizance of the fact that they were about to be discharged until such discharge actually took place.

18. On March 26, 1952 defendant Company made and entered into an Agreement with the said B.R.T. as bargaining representative of the plaintiff and his fellow employees, in which Agreement it was stated that:

"This Agreement is entered into . . . in accordance with Section 2, Eleventh of the Railway Labor Act, as amended . . . (a copy of which Agreement is attached hereto and made a part hereof as Exhibit A).

19. That the said Agreement (Exhibit A) is invalid inasmuch as it violates the provisions of the National Railway Labor Act, Title 45, U.S.C.A. 151, et seq., and as amended, and especially Section 152, Eleventh thereof in many respects, among them being,

(a) That Section 152, Eleventh does not provide for a System Board of Adjustment to be incorporated into an Agreement between the defendants herein to determine complaints initiated by the Bargaining Agent against the employee;

(b) That the System Board of Adjustment that the defendants provided for in said Agreement (Exhibit A), [fol. 9] namely, one sanctioned only by Section 153 Second of the Act, concerns itself by the provisions of the Act, and said Section, only with those specified controversies between employee and carrier and not with complaints initiated by the employees' own bargaining representative against the employee;

(c) That the provision in said Agreement requiring that the employees' own bargaining representative change its position and duty of fealty and loyalty to the employee to that of antagonist, complainant, and accuser of the employee in respect to the employees' employment relation-



ship with the employer, all of which is contrary to the provision of the Act and the law of principal and agent;

(d) That the Agreement provides for, and without sanction in the Act, and contrary to American jurisprudence, that the Bargaining Agent of the employee who has changed its position to that of accuser, shall sit in judgment of the employee in reference to its own complaint by it initiated against its principal;

(e) That the agreement attempts to provide finality to such Board's decision without the right to appeal or review or sanction from the provisions of the Act;

(f) That as a result of the conflicting role in which it places the employees' own representative, it leaves the employees unrepresented; for under the provisions of the Act, the employee is required to contact the employer through the employee's representative in matters concerning his employment;

(g) That the whole substance of the Agreement makes the employees' own bargaining representative accuser, judge, and jury, in respect to the employees' right to work, all of which is in direct conflict with settled principles of American jurisprudence;

[fol. 10] (h) That the provisions in (7c) of said Agreement making the decision of the so-called Board of Adjustment final and binding are contrary to the provisions of Section 153 Second of said Act even as to those things permitted to be handled by a System Regional Board of Adjustment (the matter in the case at bar not being one of them).

Wherefore, the plaintiff prays the Court

1. That a temporary restraining order be issued without notice against the defendants, and each of them, the officers, agents, servants, employees and attorneys and all other persons in active concert or participation with them, of the B.R.T. and the defendant Company from:

A. Continuing the discharge or suspension of the plaintiff and his fellow employees for non-membership in the defendant Labor Organization, until they have been given the opportunity for readmission or membership in the said

Labor Organization under the same terms and conditions as are available to any other member.

B. Or, in lieu of the above that the defendant Railroad Company cease and desist from continuing the discharge or suspension of the plaintiff and his fellow employees for non-membership in the defendant Labor Organization until they have been given the opportunity for readmission or membership in said Labor Organization under the same terms and conditions as are available to any other member.

C. Threatening, forcing or in any way coercing the defendant Company in order to obtain the discharge of the plaintiff and his fellow employees contrary to the statute, until after they have been allowed an opportunity for reinstatement and membership under the same terms and conditions as for any other member.

D. Refusing to permit or allow the reinstatement of the plaintiff and his fellow employees, under the same terms [fol. 11] and conditions as are available to any other member, if the defendants seek to make membership a condition of employment as required by the statute.

E. Enforcing the provisions of the Union Shop Agreement between the defendant Company and the defendant B.R.T. (Exhibit A) to terminate the plaintiff and his fellow employees' right to work; and especially from enforcing the provisions of Section 7 of the said Agreement, which Section sets up a representative of the B.R.T. as an accuser, prosecutor, judge, and jury as to the plaintiff and his fellow employees' right to work.

2. That a date be fixed for the hearing of plaintiff's application for a preliminary injunction herein after due and personal notice thereof shall have been given to such persons and in such manner as the Court shall direct, and that upon such hearing a temporary injunction be issued against the defendants and each of them; and the officers, agents, representatives and employees and the members of the B.R.T., and of the defendant Company, as specifically prayed for under paragraph 1 of this prayer.

3. That upon a final hearing, this Court will grant and issue a permanent injunction against the defendants and each of them and the officers, agents, representatives and employees, and the members of the B.R.T. and of the defend-

ant Company and each of them or any of them, and against all persons now or hereafter aiding or abetting them or any of them, enjoining and restraining them and each of them as specifically prayed for under paragraph 1 of this prayer.

4. And all other proper and equitable relief that the Court may grant.

Meyer Fix, Attorney for Plaintiff, Office and P. O. Address, 500 Powers Building, Rochester 14, New York.

[fol. 12]

# AFFIDAVIT OF MEYER FIX

STATE OF NEW YORK,

County of Monroe, City of Rochester, ss:

Meyer Fix, being duly sworn, deposes and says:

1. That he is an attorney at law with offices at 500 Powers Building, in the City of Rochester, New York, and that he is the attorney for N. P. Rychlik, individually, and on behalf of and as representative of other employees, trainmen of the Pennsylvania Railroad, on behalf of whom the claims are made in the above entitled action.

2. N. P. Rychlik was first cited for violation of the Union Shop Agreement between the defendant Company and the Brotherhood of Railroad Trainmen (Exhibit A) over 2 years ago. The plaintiff had previously been a member in good standing of the Brotherhood of Railroad Trainmen (hereinafter referred to as B.R.T.), until in or about February, 1953.

3. In or about February, 1953 the plaintiff, N. P. Rychlik, resigned his membership from the said B.R.T. and became a member in good standing of the United Railroad Operating Crafts (hereinafter referred to as UROC) which the plaintiff fully believed in good faith to be a railroad union national in scope.

4. Sometime after February of 1953, plaintiff was cited for non-compliance with the Union Shop Agreement between the defendant Company and the B.R.T. (Exhibit A). Subsequent to this time and on or about August 27, 1953 plaintiff was given a hearing under the provisions of the said Union Shop Agreement (Exhibit A), at which time an ultimate decision was postponed until such time as there might be a

[fol. 13] more conclusive determination as to whether the said UROC was in fact a Union national in scope.

5. That on August 23, 1954, at a hearing conducted in Pittsburgh, Pennsylvania, the plaintiff, through your deponent, presented receipts and gave evidence of the fact that the plaintiff had joined the Switchmen's Union of North America on July 31, 1954, and that plaintiff was a member in good standing as of the time of the hearing.

6. Plaintiff has been since July 31, 1954 and is as of the present a member in good standing of the Switchmen's Union of North America, a union which is uniformly recognized as being national in scope, as that term is employed in the Railway Labor Act.

7. That despite the fact that the plaintiff is presently a member in good standing of the Switchmen's Union of North America, and in spite of the fact that there has been no conclusive determination of the status of the said UROC, and despite the fact that administrative proceedings have been instituted by the said UROC to have itself recognized as national in scope, the plaintiff received on the 3rd of January, 1955, a letter from the System Board of Adjustment, annexed hereto as Exhibit B, informing him of the decision of the said Board that he had not complied with the Union Shop Agreement between the defendant Company and the B.R.T. (Exhibit A).

8. That despite the fact that the said agreement between the defendant Company and the B.R.T. (Exhibit A), violates the principles of American jurisprudence, in respect to the plaintiff and his fellow employees, in that it sets up the representative of the said B.R.T. as accuser, prosecutor, judge, and jury, and despite the fact that the plaintiff is presently a member in good standing of the Switchmen's Union of North America, uniformly conceded to be a union national in scope under the terms of the Railway Labor Act, [fol. 14] the plaintiff was notified by the defendant Company, through its agents, by a telephone call on or about January 14, 1955, that he was out of service.

9. That the said phone call was the first notification that the plaintiff received that he was out of service, and therefore the plaintiff was unable to petition the Court for a relief before his discharge, since he had no written notice thereof.



10. That on or about January 17, 1955 plaintiff received from the defendant Company, through its agent, E. Adams, Superintendent, (Exhibit C) written notification of the fact that his services had been terminated as of January 14, 1955.

11. That on information and belief plaintiff's fellow employees also received telephone notification of their discharge, and subsequent thereto received written notice of their discharge.

12. That because the plaintiff was in compliance with the provisions of the Railway Labor Act, providing that he must belong to a union which is national in scope, in that he belonged to the Switchmen's Union of North America, and because the procedures provided for in the Union Shop Agreement between the defendant Company and the B.R.T. (Exhibit A) are invalid in light of recognized principles of American jurisprudence in that they provide that the representative of the Union may act as accuser, prosecutor, judge, and jury, and in that the plaintiff and his fellow employees, have made every reasonable effort, to rejoin the B.R.T. and all such efforts have been thwarted by the B.R.T., your deponent strongly urges that the relief prayed for be granted in this action.

Meyer Fix.

Subscribed and sworn to before me this 24th day of January, 1955. Esther C. Bridges, Notary Public, State of New York, County of Monroe. Commission expires March 30, 1956.

[fol. 15]

## EXHIBIT A

### Union Shop Agreement

This agreement is entered into this 26th day of March, 1952, in accordance with Section 2, Eleventh of the Railway Labor Act, as amended, by and between The Pennsylvania Railroad Company (hereinafter referred to as the "Carrier") and its employes of the crafts or classes represented by the Brotherhood of Railroad Trainmen (hereinafter referred to as the "Brotherhood").

It is hereby agreed:

1. Subject to the terms and conditions hereinafter set forth, all employes of the Carrier now or hereafter subject

to the rules and working conditions agreement between the parties hereto shall, as a condition of their continued employment subject to such agreement, become members of the Brotherhood party to this agreement representing their crafts or classes within sixty (60) calendar days of the date and they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in good standing in such Brotherhood while subject to the rules and working conditions agreement between the parties; provided, however, that the foregoing requirement for membership in the Brotherhood shall not be applicable to:

(a) Employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member, or

(b) Employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood, or

[fol. 16] (c) Employees covered by the rules and working conditions agreement between the parties, who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service; provided, that nothing contained in this agreement shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

2. Employees who retain seniority under the rules and working conditions agreement, between the parties hereto, governing their classes or crafts and who are assigned or transferred for a period of thirty (30) calendar days or more to employment not covered by such agreement, or who are on leave of absence for a period of thirty (30) calendar days or more, will not be required to maintain membership as provided in Section 1 of this agreement so long as they remain in such other employment, or on such leave of absence, but they may do so at their option. If and when

such employes return to any service covered by the said rules and working conditions agreement, they shall, as a condition of their continued employment subject to such agreement, comply with the provisions of Section 1 of this agreement within thirty (30) calendar days of such return to service.

3. An employe whose membership in the Brotherhood is terminated while on furlough due to reduction in force, or while off duty on account of sickness or injury for a period of thirty (30) calendar days or more, and who is required to maintain membership under the provisions of Section 1 of this agreement, shall be granted upon his return to service in any of the crafts or classes represented by the Brotherhood a period of thirty (30) calendar days within which to become a member of the Brotherhood.

[fol. 17] 4. Every employe required by the provisions of this agreement to become and remain a member of a labor organization shall be considered by the Carrier to be either a member of the Brotherhood as provided for herein or to be a member of any one of the other labor organizations referred to in Section 1 hereof, unless the Carrier is advised to the contrary in writing by the Brotherhood. The Brotherhood shall be responsible for initiating action to enforce the terms of this agreement.

5. (a) The General Chairman of the Brotherhood will, between the fifteenth day and the last day of any calendar month, furnish to the Superintendent of the Division involved, in writing and in duplicate, the name and roster number of each employe whose seniority and employment the Brotherhood requests be terminated by reason of failure to comply with the membership requirements of this agreement.

(b) In the event that the Superintendent wishes to dispute the correctness of the Brotherhood's position, he shall so notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the Superintendent, or if the General Chairman does not withdraw the notice within ten (10) calendar days from the date of the Superintendent's notice of exception, the Superintendent will transmit to the employe at his last known ad-

dress through registered United States mail with return receipt requested, the original of the General Chairman's notice, accompanied by an explanatory letter.

(c) Within ten (10) calendar days from the date of the Superintendent mailing notice to the employe, as provided in paragraph (b) of this Section 5, the said employe's seniority and employment in the crafts or classes represented by the Brotherhood shall be determined, unless the notice is withdrawn by the Brotherhood in the interim, or unless a proceeding under the provisions of Section 7 of this agreement is instituted.

[fol. 18] 6. The provisions of the rules and working conditions agreement between the parties pertaining to investigations, trials and appeals, ~~are~~ inapplicable to the termination of seniority and employment provided for in this agreement.

7. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of four members, two to be appointed by the Carrier and two by the Brotherhood.

(b) An employe notified in accordance with the provisions of Section 5 hereof that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employe in writing the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employe's compliance with the provisions of this agreement. The employe will be required at this hearing to furnish substantial proof of his compliance with the provisions of this agreement.

(c) The decision of the System Board of Adjustment shall be by majority vote and shall be final and binding.

(d) In the event the System Board of Adjustment is unable to reach a decision, the matter will be submitted to a neutral arbitrator to be selected by the National Media-



tion Board, whose decision as to whether or not the employe has complied with the provisions of this agreement shall be final and binding.

(e) Receipt by the Secretary of the Board of notice from an employe that he wishes to dispute the charge that he has [fol. 19] failed to comply with [the membership requirements of this agreement shall operate to stay action on the termination of his seniority and employment pending final decision and for a period of ten (10) calendar days thereafter.

(f) The fee and expenses of the neutral arbitrator, which shall be limited to the amount regularly established by the National Mediation Board for such service, shall be borne equally by the Carrier and the Brotherhood.

8. (a) Neither this agreement nor any provision contained herein shall be used as a basis for a grievance or time or money claim against the Carrier nor shall any provision of any other agreement between the parties hereto be relied upon in support of any claim that may arise as the result of the operation of this agreement.

(b) In the event that seniority and employment in the crafts or classes covered by this agreement is terminated under the provisions of this agreement, and such termination of seniority and employment is subsequently determined to be improper, the employe whose seniority and employment was so terminated shall be returned to service in said crafts or classes without impairment of seniority rights. In the event an employe brings an action for allegedly wrongful discharge, the Brotherhood and the Carrier shall share equally any liability imposed in favor of such employe, except in a case where the Railway Labor Act, as amended, and this Agreement under it are held by a court of competent jurisdiction to be illegal or unconstitutional or in violation of State Statutes; or where the Carrier is the plaintiff or moving party in any action; or where the Carrier acts in collusion or collaboration with an employe seeking damages, resulting from termination of his seniority and employment.

9. This agreement is in full, final and complete settlement of the dispute growing out of the request contained

[fol. 20] in the notice served on The Pennsylvania Railroad Company on February 1, 1951, by the Brotherhood of Railroad Trainmen, except the request for deduction of union dues shall be subject to further negotiation between the parties hereto. This agreement shall become effective April 1, 1952, and shall remain in effect until revised or cancelled in accordance with the procedure prescribed by the Railway Labor Act, as amended.

The Pennsylvania Railroad Company, By: (S.) J. A. Schwab, General Manager, Eastern Region; (S.) A. J. Greenough, General Manager, Central Region; (S.) J. B. Jones, General Manager, Western Region; Road and Yard Conductors, Road and Yard Brakemen, Baggage-men, Ticket Collectors, Car Retarder Operators, Switchtenders and Hump Motor Car Operators, Employees of the Pennsylvania Railroad Company, By: Brotherhood of Railroad Trainmen, By: (S.) H. F. Sites, General Chairman; (S.) U. D. Hartman, General Chairman.

Philadelphia, Pa., March 26, 1952.

[fol. 21]

EXHIBIT "B"

The Pennsylvania Railroad—Baltimore and Eastern Railroad—Brotherhood of Railroad Trainmen—System Board of Adjustment

Room 459, Pennsylvania Station, 30th Street, Philadelphia, Pa. Hearing No. 110

Mr. N. P. Rychlik, 315 North Ogden Street, Buffalo 6, New York

DEAR SIR:

This letter is in reference to hearings held at Pittsburgh, Pa., on August 27, 1953 and August 23, 1954, under the provisions of the Union Shop Agreement effective April 1, 1952 between The Pennsylvania Railroad Company and its employees represented by the Brotherhood of Railroad Trainmen.

Following thorough review, consideration and discussion of the evidence the Board first concluded that membership

in the United Railroad Operating Crafts does not constitute compliance with the Union Shop Agreement. And in the light of this determination rendered the following decision in your case:

Decision: N. P. Rychlik has not complied with the membership requirement for continued employment as set forth in the Union Shop Agreement effective April 1, 1952.

[fol. 22] By order of The Pennsylvania Railroad—Baltimore and Eastern Railroad—Brotherhood of Railroad Trainmen—System Board of Adjustment.

(S.) W. E. Conrad, Secretary.

Dated at Philadelphia, Pa., on the 3rd day of January, 1955.

cc: Mr. E. P. Adams, Superintendent, Northern Division.

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EXHIBIT "C"

Buffalo, N. Y., January 14, 1955. 18-PC

Mr. N. P. Rychlik, 315 North Ogden Street, Buffalo, 6,  
N. Y.

DEAR SIR:

In compliance with decision contained in letter dated January 3, 1955 addressed to you from the System Board of Adjustment, your seniority and service will be terminated as of January 14, 1955.

Yours truly, E. P. Adams, Superintendent.

[fol. 23] UNITED STATES DISTRICT COURT, WESTERN DISTRICT  
OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE—Entered January 28, 1955

Upon reading the annexed Complaint of N. P. Rychlik, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, duly verified the 21st day of January, 1955, and the affidavit of Meyer Fix, Esq., sworn to the 24th day of January, 1955, and the exhibit

annexed thereto and sufficient cause appearing therefore, it is

Ordered, that the defendants U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, H. F. Sites, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, [fol. 24] S. G. Gailey, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, and the Pennsylvania Railroad Company, Inc. and each of them, show cause before this Court at a term thereof to be held at the District Court Building in the City of Buffalo, County of Erie, on the 3rd day of February, 1955, at 2 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an Order should not be made by this Court restraining the said defendants, and each of them, and granting the relief prayed for in the annexed verified Complaint, and it is further

Ordered, that service of this Order by United States mail sent special delivery and registered upon the said U. D. Hartman, H. F. Sites, S. G. Gailey, not later than the 31st day of January, 1955, shall be sufficient and it is further

Ordered, that service of this Order upon the Defendant Pennsylvania Railroad Company, not later than the 31st day of January, 1955, shall be sufficient.

John Knight, United States District Court Justice  
for the Western District of the State of New York.

#### IN UNITED STATES DISTRICT COURT

ORDER PERMITTING INTERVENER—Entered March 2, 1955

The individual defendants, U. D. Hartman, H. F. Sites and S. G. Gailey, having appeared specially and objected to alleged service of process upon them as defective, moved [fol. 25] to dismiss the plaintiff's complaint as to each and all of said defendants, and said motion having been granted by the Court, and

The Brotherhood of Railroad Trainmen, an unincorporated association, having moved to intervene as a party

defendant in the above entitled action, and the plaintiff and the co-defendant, Pennsylvania Railroad Company, having consented thereto,

Now, on motion of Harold J. Tillou, attorney for the Brotherhood of Railroad Trainmen, it is hereby

Ordered that the Brotherhood of Railroad Trainmen be and hereby is granted authority and permission to intervene as party defendant.

And it is further ordered that the action and all proceedings in the future shall be entitled N. P. Rychlik, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, Plaintiff, against Brotherhood of Railroad Trainmen, an unincorporated association, Intervening Defendant, and The Pennsylvania Railroad Company, a corporation, Defendant.

And it is further ordered that the said intervening defendant, Brotherhood of Railroad Trainmen, shall have twenty days in which to file an answer to the plaintiff's complaint from and after the determination of motions to dismiss the plaintiff's complaint, in the event that such answer shall be required.

John Knight, U. S. District Court Judge.

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[fol. 26] UNITED STATES DISTRICT COURT, WESTERN DISTRICT  
OF NEW YORK

[Title omitted]

DEFENDANT BROTHERHOOD'S MOTION TO DISMISS—Entered  
March 2, 1955

The Brotherhood of Railroad Trainmen, intervening defendant, moves to dismiss the plaintiff's complaint upon the law upon the following grounds:—

1. That the plaintiff has not set forth a cause of action in his complaint.
2. That the Court has no jurisdiction to determine the alleged issues involved.



3. That the alleged issues are solely within the determination of the System Board of Adjustment under the System Adjustment Board established pursuant to the Railway Labor Act.

4. That the plaintiff's complaint should be dismissed.

Dated, February 8, 1955.

Yours etc., Harold J. Tillou, Attorney for Intervening Defendant, Office and P. O. Address, 510 Erie County Bank Building, Buffalo, New York.

[fol. 27] UNITED STATES DISTRICT COURT, WESTERN DISTRICT  
OF NEW YORK

[Title omitted]

DEFENDANT PENNSYLVANIA RAILROAD'S MOTION TO DISMISS  
—Filed June 22, 1955

Proceedings had before Hon. John Knight, United States District Judge, Western District of New York, at Buffalo, New York, February 8, 1955, at 2:00 o'clock P. M.

Appearances:

Meyer Fix, Esq. and Norman Spindelman, Esq., Attorneys for Petitioners.

Harold J. Tillou, Esq., Attorney for Brotherhood of Railroad Trainmen.

Adams, Smith, Brown and Starrett, Esqs., by Percy Smith, Esq., of Counsel, and Richard N. Clattenburg, Esq., Assistant General Counsel for Pennsylvania Railroad, attorneys for The Pennsylvania Railroad.

Mr. Tillou: Now, if the Court please, at this time I move that the individual defendants named, V. D. Hartman, H. F. Sites and S. G. Gailey, be stricken out as party defendants.

The Court: You said they haven't been served?

[fol. 28] Mr. Tillou: One has been served.

Mr. Fix: Let me acquaint your Honor with what has transpired since we were here last week. Mr. Tillou called me in Rochester last week and asked me if I would have any objection to having these three individuals, as individuals,

dropped and I said no objection and then he said he was going to intervene with the Brotherhood organization and on that we have no objection.

The Court: Motion is granted.

Mr. Tillou: Now I ask that the Brotherhood of Railroad Trainmen be allowed to intervene as a party defendant in this action.

Mr. Fix: Satisfactory.

The Court: So ordered.

Mr. Tillou: I suggest I prepare an order for your Honor to that effect and I will furnish that later.

The Court: Very well.

Mr. Tillou: At this time, on behalf of the Brotherhood of Railroad Trainmen, I move that the complaint be dismissed on the law and I realize, from what you Honor has said, this is, I believe, strictly a question of law. It is too complicated to ask your Honor to make a decision on it and we will certainly have to submit briefs.

The Court: I have been through the papers so I understand perfectly well what the situation is.

Mr. Clattenburg: Your Honor, I also would like to note a motion to dismiss on the ground that the complaint fails to state a cause of action.

(Argument on motion.)

[fol. 29] UNITED STATES DISTRICT COURT, WESTERN DISTRICT  
OF NEW YORK

N. P. RYCHLIK, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, Plaintiff,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, Intervening Defendant,

and

PENNSYLVANIA RAILROAD COMPANY, Defendant.

OPINION OF COURT—Filed February 23, 1955

Appearances:

Meyer Fix, 500 Powers Building, Rochester, N. Y., Attorney for Plaintiffs.

Harold J. Tillou, 501 Erie County Bank Building, Buffalo, New York, Attorney for Intervening Defendant, Brotherhood of Railroad Trainmen.

Adams, Smith, Brown & Starrett, Walbridge Building, Buffalo, New York, Attorneys for Defendant, Pennsylvania Railroad Company.

The above entitled matter comes before this Court on an order to show cause obtained by the plaintiff why an order should not be made restraining and granting certain injunctive relief against the defendants, Hartman, Sites, and Gaily, individually and as members of and representatives of the Brotherhood of Railroad Trainmen (hereinafter called "BRT") and the Pennsylvania Railroad (hereinafter called "Penn"). By consent of the parties, the BRT was permitted to intervene as defendants in place of the individuals, Hartman, Sites, and Gaily:

[fol. 30] The complaint was verified, and attached thereto was an affidavit of the attorney for the plaintiff, purported to be made on knowledge and not on information and belief. It will be seen that numerous matters touching the determination herein are included in the affidavit which are not set forth in the complaint. It seems obvious that the attorney could have no personal knowledge of various of the alleged facts set forth in the affidavit. However, in view of the decision at which I arrive, the affidavit of the attorney will be considered.

The defendants have moved to dismiss the complaint on the grounds that the plaintiff has not set forth a cause of action in his complaint; that the Court has no jurisdiction to determine the alleged issues involved; and that the alleged issues are solely within the determination of the System Board of Adjustment established pursuant to the Railroad Labor Act. As alleged in the Complaint, such employees were discharged by Penn upon notice served on or about January 17, 1955 and, as also alleged in the Complaint, during the year 1953 they "allowed their membership to lapse". The plaintiff timely appealed to the System Board of Adjustment and their appeal was pending until January 17, 1955, when the plaintiff was discharged. The delay apparently was caused by the effort to determine whether membership in the United Railroad Operating

Crafts (hereinafter referred to as "UROC") constituted compliance with Union Shop Agreement. Meanwhile the plaintiff continued in his employment till his discharge.

A temporary restraining order was sought, but this was refused since the plaintiff had already been discharged. A permanent injunction is now sought for the reinstatement of the plaintiff and his fellow employees on the ground their discharge for non-compliance with the Union Shop Agreement between the BRT and Penn was illegal. A copy of such Agreement was attached as a part of the Complaint. [fol. 31] It appears that plaintiff was a member of UROC at the time of his discharge and as appears from the discharge notice set out in the Complaint that plaintiff was discharged because membership in UROC did not constitute compliance with the Union Shop Agreement. (Exhibit A.) The BRT is a union organization, certified under the Railway Labor Act to represent operating employees of Penn employed as brakemen and conductors on its railroad lines. Plaintiff was a trainman.

On or about the 26th day of March, 1952, BRT and Penn entered into a Union Shop Agreement, pursuant to the provisions of Sec. 2 Eleventh of the Railway Labor Act, as amended. (Exhibit A attached to the Complaint.) Plaintiff asserts that he joined the Switchmen's Union on July 31, 1954 and he presented proof of such membership at a hearing in Pittsburgh, Pa. on August 23, 1954. What his status was as regards UROC then or now does not appear.

In the complaint there is no allegation that the plaintiff became a member of UROC, but the affidavit contains this statement: "In or about February 2, 1953, the plaintiff, Rychlik, resigned his membership from the said BRT and became a member in good standing of the Railroad Operating Crafts, which the plaintiff fully believed in good faith to be a railroad union national in scope."

It is significant that this is made by the attorney for the plaintiff. It also appears from a further statement in such affidavit that plaintiff was a member of the BRT until in or about February, 1953. On August 23, 1954, at Pittsburgh, Penn., the plaintiff presented proofs showing that he had joined the Switchmen's Union of North America on July 31, 1954, and that the plaintiff was a member in good

standing in the Switchmen's Union as of the time of the hearing; that since that time he has continued as a member [fol. 32] in good standing of the Switchmen's Union of North America, which is recognized as being national in scope. It is alleged that there has been no conclusive determination of the status of the said UROC. On January 3, 1955, plaintiff was notified by the System Board of Adjustment of its decision that he had not complied with the Union Shop Agreement between the Penn. and BRT (Exhibit "B" attached to complaint). On January 14, 1955, he was orally notified by the defendant company that he was out of the service. On January 17, 1955, he received a written notification of the termination of his service as of January 14, 1955.

There is nothing in the complaint or affidavit which shows that plaintiff ever resigned membership in the UROC.

Section 153, Title 45, insofar as applicable, provides for the composition of Adjustment Boards and provides:

**"Section 153**

**First.**

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

**First Division:** To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organization of the employees.

**Second.** Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment



of system, group, or regional boards of adjustment for [fol. 33] the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

Section 152, Title 45, deals with collective bargaining and agreements between carriers and labor organizations and provides, in part:

#### Section 152

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter:

\* \* \* a labor organization \* \* \* duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Eleventh.

(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-[fol. 34] paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, \* \* \* if said employee shall hold or acquire membership in any one of the labor organizations, *national in scope*, (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; \* \* \* *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, *national in scope* (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him." 6

In pursuance of the provisions of the Act, the BRT and the Penn. entered into an agreement (Exhibit "A" attached to complaint). Subdivisions 5 and 7 of that agreement are pertinent to the issues herein and provide:

"5. (a) The General Chairman of the Brotherhood will, between the fifteenth day and the last day of any calendar month, furnish to the Superintendent of the Division involved, in writing and in duplicate, the name and roster number of each employee whose seniority and employment the Brotherhood requests be terminated by reason of failure to comply with the membership requirements of this agreement.

(b) In the event that the Superintendent wishes to dispute the correctness of the Brotherhood's position, he shall notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the Superintendent, or if the General Chairman does not withdraw the notice within ten (10) calendar days from the date of the Superintendent's

notice of exception, the Superintendent will transmit to the employee at his last known address through registered United States mail with return receipt re-[fol. 35] quested, the original of the General Chairman's notice, accompanied by an explanatory letter.

(c) Within ten (10) calendar days from the date of the Superintendent mailing notice to the employee, as provided in paragraph (b) of this Section 5, the said employee's seniority and employment in the crafts or classes represented by the Brotherhood shall be terminated, unless the notice is withdrawn by the Brotherhood in the interim, or unless a proceeding under the provisions of Section 7 of this agreement is instituted.

7. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of four members, two to be appointed by the Carrier and two by the Brotherhood.

(b) An employee notified in accordance with the provisions of Section 5 hereof that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employee in writing the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employee's compliance with the provisions of this agreement. The employee will be required at this hearing to furnish substantial proof of his compliance with the provisions of this agreement.

(c) The decision of the System Board of Adjustment shall be by majority vote and shall be final and binding."

It appears from the complaint and affidavit herein that this agreement was in effect at the time the plaintiff re-

signed from the BRT in February of 1953, and that in accordance with that agreement, his grievance was heard before the System Board of Adjustment set up in accord-[fol. 36] ance thereto. The proceedings before said Board were not certified herewith in this action nor was any transcript of the same furnished to the Court; in fact, the complaint itself is silent as to any such proceedings, nor does the prayer of said complaint request that such a review be made by the Court. The affidavit of the attorney for the plaintiff states that the proceedings were conducted before the System Board of Adjustment and that, as a result of said proceedings, the discharge of the plaintiff was ordered. (See Exhibit "B" attached to the affidavit.)

That courts have reviewed proceedings before the System Board of Adjustment is well established.

*Edwards v. Capital Airlines*, 176 F. (2) 755

*Michaels v. National Tube Co.*, 122 Fed. Supp. 726

*Washington Tennessee Co. v. Boswell*, 124 F. (2) 235

But even in those cases where the court reviewed such proceedings, it was held that judicial inquiry is at an end once it is determined (1) That the Board's procedure and the award conform substantially to the Statute and Agreement; (2) That the award confined itself to the letter of submission; and (3) That the award was not arrived at by fraud or corruption. *Farris v. Alaska Airlines*, 113 Fed. Supp. 907; *Moore v. Illinois Central*, 312 U. S. 630. There is nothing before the Court from which it can determine that the procedure and findings before the System Board of Adjustment did not conform substantially to the Statute and Agreement or that the finding of the Board was not confined to the matter submitted to it or that the award was arrived at by fraud or corruption. In *Bauer v. Eastern Airlines*, 214 F. (2) 623, the court, in reviewing the action of the [fol. 37] Board had before it the entire administrative record from which it could properly review and pass on the propriety of the same. This Court has not been given the benefit of the record before the Board and of necessity must confine itself to the papers before it. The Court will not consider de novo the circumstances of the discharge of the plaintiff. See *Bauer v. Eastern Airlines*, supra. This does

not mean that in a proper case the court would be foreclosed from considering the essential fairness of the administrative proceeding, even if the issues are raised collaterally, and in a proper case, it would be the duty of the court to determine whether the Board had given the plaintiff a full and fair hearing and exercised its honest judgment in reaching its conclusion.

The fact that the agreement between the BRT and the Railroad provides for a System Board consisting of two representatives of the Railroad and two from the Union does not per se make such an agreement invalid. The courts, in recent years, have had before it for review many cases conducted before Boards of a similar structure and have commented that when a Board is so constituted, the award itself is presumably valid, (*Edwards v. Capital Airlines*, supra) but in a proper proceeding is not immune from judicial examination nor is the fact that some member of the Board might be prejudiced or that they might make an erroneous decision sufficient to give the court jurisdiction. There is no allegation in the complaint or proof submitted that any member of the Board so discriminated against the plaintiff as to bring this case within the rule of *Steele v. Louisville & N. R. Co.*, 323 U. S. 192. The Court is not faced with an agreement illegal in itself which might give it jurisdiction under the *Steele* case, supra. See also *Tunstall v. Brotherhood of Locomotive Firemen, Enginemen*, 323 U. S. 210 and *Brotherhood of Railroad Trainmen v. Howard*, 343 [fol. 38] U. S. 768. The courts have, on many occasions, distinguished between the *Steele*, *Tunstall*, and *Howard* cases, supra, and cases such as the case at bar which involves the interpretation or application of agreements, and that distinction has been made clear in many decisions, e. g., *Spires v. Southern Railway Co.*, 204 F. (2) 453; *Hayes v. Union Pacific Railroad Co.*, 184 F. (2) 337; *United Railroad Operating Crafts v. Northern Pacific Railroad Co.*, 208 F. (2) 135, cert. den. 347 U. S. 929; and *United Railroad Operating Crafts v. Pennsylvania Railroad*, 212 F. (2) 938.

In the instant case, neither the Railroad nor the Brotherhood has filed any answer, but the question of jurisdiction and sufficiency of the complaint have been raised by both, and the Court, in any event, would be bound to consider such



questions even if not raised. *U. S. v. Corrick*, 298 U. S. 435, *United R. R. Operating Crafts v. Pennsylvania Railroad*, 221 F. (2) 938; and the recent case of *Alabaugh v. Baltimore & Ohio Railroad Co.*, 125 Fed. Supp. 401. This Court, on the facts presented, finds no invalidity in the agreement.

The plaintiff claims that after his resignation in the BRT, the BRT refused to reinstate him. There appears to be no grounds for the equitable intervention of this Court for such refusal. A like question was discussed by the court in *Alabaugh v. Baltimore & Ohio Railroad Co.*, supra, wherein the court, at page 407, said:

"When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B & O which requires such action.

The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that 'they that take the sword shall perish with the sword' unless some constitutional or other [fol. 39] legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in UROC create any right in plaintiffs to secure an order for reinstatement in this case.

So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B & O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board."

The plaintiff also claims that at the time of his discharge, he was a member of the Switchmen's Union of North America, a union "national in scope", recognizable under the Railroad Act. Unquestionably, the Act itself does not require any employee to belong to any particular Union as long as it has been recognized as national in scope and the majority of any craft have the right to determine who shall be the representatives of the craft or class (Sec. 152, Title 45, U. S. C.), and that nothing in any agreement shall prevent the employee from changing membership from one

organization to another organization (Sec. 152, Eleventh (c), Title 45, U. S. C.). It would appear that the Act, however, contemplates the continued membership in a Union national in scope. That the BRT and Switchmen's Union are such is admitted. The plaintiff in the instant case ceased, by his own act, his membership in the BRT and did not join the Switchmen's Union until shortly before his final hearing before the System Board in August 1954, although he had been cited before the Board and given a hearing as early as August of 1953. Judge Thomsen, in the *Alabaugh* case, at pages 406 and 407, stated:

"Maintenance of membership within the contemplation of that amendment means continued payment of dues to a qualifying union. The reason for such requirement is obvious, and is discussed in *Pigott v. Detroit T. & I. R. Co.*, 116 Fed. Supp. at 955, note 11. In the case at bar plaintiffs withdrew from the Brotherhood and stopped paying dues to it. For that reason they were expelled by Brotherhood, and are being discharged by B. & O."

[fol. 40] And again:

"Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B. & O. under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). \* \* \* But they have chosen to stake all on UROC. Having lost, they sought reinstatement in Brotherhood."

I therefore hold that the Statute itself contemplates continued membership in a qualified union and that that question was one for proper determination in the first instance by the System Board of Adjustment. The plaintiff, in his

brief, has requested this Court to pass on the question as to whether UROC is national in scope.

It is not necessary for this Court to decide under the facts submitted in this case whether UROC is a labor organization "national in scope." In fact, that function, under the Railway Act, is left to specific administrative procedure. The National Mediation Board, provided for in Section 154, Title 45, U. S. C., and consisting of three public members appointed by the President, is authorized (Sec. 152, Ninth, 45 USC) whenever a jurisdictional dispute arises between rival unions, to investigate such dispute and then to certify the union which is to act as bargaining representative for the employees in question. Such certifications are held to be exclusively within the competency of the National Mediation Board and its decisions are conclusive and not subject to review. (*Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297; *General Committee v. Missouri K. T. R. Co.*, 320 U. S. 323.) In the latter case, the court said:

"However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the Courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board."

The special administrative procedure of Section 153 is therefore vested with exclusive jurisdiction to determine whether a labor organization is national in scope and organized in accordance with the Act when a dispute arises pursuant to the right of the labor organization to participate in the National Railroad Adjustment Board machinery as said in *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949 (1953) at page 954:

"It is the type of issue which those that are conversant with the specialized problems of the railroad industry are most capable of evaluating."

Again, the court, in the *Pigott* case, remarked:

"If the question of its status were open to the courts, which are located in various areas of the nation, it is

conceivable that such different jurisdictions would reach contrary conclusions if concurrent suits with separate carriers were to be litigated."

For the reasons stated herein, the Court denies the application for an injunction pendente lite and the motion to dismiss the complaint is granted. (Entry of the order herein, however, will be delayed for the period of one week to afford the plaintiffs opportunity to apply for an injunction pending appeal if they decide to appeal.)

John Knight, United States District Judge.

February —, 1955.

[fol. 42] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT, ENTERED MARCH 4, 1955.

[Title omitted]

An order to show cause having heretofore been granted by the Hon. John Knight, United States District Judge for the Western District of New York, upon the complaint of the plaintiff, verified the 21st day of January, 1955, and the affidavits of Meyer Fix, sworn to the 24th day of January, 1955, together with exhibits thereto attached, returnable before this Court on the 3rd day of February, 1955, ordering the defendants to show cause "why an order should not be made by this Court restraining the said defendants, and each of them, and granting the relief prayed for in the annexed verified complaint," and

The defendants U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, H. F. Sites, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, and S. G. Gailey, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, having duly appeared specially and objected to service of process, and the matter having been duly adjourned to the 10th day of February, 1955, and

The defendants U. D. Hartman, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, H. R. Sites, individually and as a member of and on behalf of, and as representative of the Brotherhood of Railroad Trainmen, and S. G. Gailey, individually and as a member of and on behalf of and as representative of the Brotherhood of Railroad Trainmen, having moved for dismissal of the complaint as against them, and said motion having been granted by consent of all parties, and

The Brotherhood of Railroad Trainmen having moved to intervene as party defendant, and said motion to intervene having been duly granted by the Court by consent of all the parties, and the cause having been continued under the amended title of N. P. Rychlik, individually and on behalf of and as representative of other Employees of the Pennsylvania Railroad, Plaintiff, against Brotherhood of Railroad Trainmen, an unincorporated association, Intervening Defendant, and Pennsylvania Railroad Company, Defendant, and

[fol. 44] The Pennsylvania Railroad Company and the Brotherhood of Railroad Trainmen having duly moved to dismiss the plaintiff's complaint on the ground of lack of jurisdiction and upon the ground that the complaint failed to state a cause of action, and the parties having duly submitted the question to the Court for determination, Meyer Fix, attorney, appearing on behalf of the plaintiff, and Harold J. Tillou, attorney, appearing on behalf of the Brotherhood of Railroad Trainmen, and Adams, Smith, Brown & Starrett, attorneys, Percy R. Smith, of Counsel, on behalf of the Pennsylvania Railroad Company, and due deliberation having been had thereon,

Now, on motion of Harold J. Tillou, attorney for the Brotherhood of Railroad Trainmen, and Percy R. Smith, of counsel for the defendant Pennsylvania Railroad Company, it is hereby.

Ordered, decreed and adjudged that the restraining order demanded by the plaintiff be and hereby is denied as to the named plaintiff and as to all other employees of the Pennsylvania Railroad Company as a class in this action who are represented by or purport to be represented by the plaintiff N. P. Rychlik.



And it is further ordered that the plaintiff's complaint be and hereby is dismissed and upon the ground that the plaintiff's complaint fails to state a cause of action.

And it is further ordered that said complaint be dismissed as to the plaintiff, N. P. Rychlik, and as to all other employees of the Pennsylvania Railroad Company as a class in this action who are represented by or purport to be represented by the plaintiff N. P. Rychlik.

John Knight, United States District Court Judge.

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[fol. 45] UNITED STATES DISTRICT COURT, WESTERN DISTRICT  
OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Filed April 1, 1955

Notice is hereby given that N. P. Rychlik, Individually and on behalf of and as Representative of other employees of the Pennsylvania Railroad, plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from an order of Hon. John Knight, entered in this action on the 2nd day of March, 1955, dismissing the complaint for failure to state a cause of action, and denying the plaintiff's application for an injunction pendente lite, and from each and every part of said order, as well as the whole therefore. All questions of law will be raised for review.

Dated: March 31, 1955.

Meyer Fix, Attorney for the Appellant, N. P. Rychlik,  
Individually and on behalf of and as representative  
or other employees of the Pennsylvania Railroad,  
Office and P. O. Address, 500 Powers Building,  
Rochester 14, New York.

[fol. 46] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING RECORD, ENTERED MAY  
9, 1955

On application of the plaintiff ex parte, the Court being fully advised, it is

Ordered that the time for filing the record on appeal in the United States Court of Appeals for the Second Circuit, and for docketing therein the appeal taken by plaintiff by notice of appeal filed April 1, 1955, is extended to June 30, 1955 pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: May 9, 1955.

(S.) Harold P. Burke, U. S. D. C. J.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MEYER FIX

(Same title)

STATE OF NEW YORK,

County of Monroe, City of Rochester, ss:

Meyer Fix, being duly sworn, deposes and says:

1. That he is an attorney-at-law before the Bar of the Courts of the State of New York and of the United States District Court for the Western District of New York, and has offices at 500 Powers Building in the City of Rochester, State of New York, and that he is the attorney of record for N. P. Rychlik individually and on behalf of and as representative of other employees, trainmen of the Pennsylvania Railroad, on behalf of whom the claims are made in the above entitled action.

[fol. 47] That a Notice of Appeal was filed in the above entitled action on April 1, 1955 from an order of Hon. John Knight, entered in this action on the 2nd day of March, 1955, dismissing the complaint for failure to state a cause of action.

3. That a motion for reconsideration or for relief under Rule 60 (b) from order and final judgment, was heard by the Hon. John Knight, District Judge, on March 21, 1955.

4. That the Hon. John Knight rendered a decision on the motion for reargument but because of illness was unable, and still is unable, to sign an order denying the motion for reargument.

5. That your deponent wishes to consolidate the appeal from the denial of the motion for reconsideration or for relief under Rule 60 (b) from order and final judgment, with the appeal taken from the order entered on March 2, 1955.

6. That your deponent has consulted with Harold J. Tillou, Esq., attorney for the intervening defendant, Brotherhood of Railroad Trainmen, and that Mr. Tillou has no objection to an extension for the time of docketing the record on appeal.

7. That your deponent respectfully requests the Court to extend the time for the docketing of the appeal under Rule 73 (g), so that both appeals may be consolidated before the Court of Appeals for the Second Circuit.

Meyer Fix.

Subscribed and sworn to before me this 9th day of May, 1955 Esther C. Bridges, Notary Public.  
Esther C. Bridges, Notary Public. State of New York, County of Monroe. Commission Expires March 30, 1958.

[fols. 48-64] IN UNITED STATES DISTRICT COURT

STIPULATION SETTLING RECORD—Filed June 22, 1955

It Is Hereby Stipulated by and between the attorneys for the respective parties herein that the record on appeal in the above entitled action shall consist of the Pages 1 to 57, inclusive, hereto attached, and that all other papers and documents on file in the Office of the Clerk of the United States District Court for the Western District of New York

shall be omitted from the appeal record as having no bearing upon or relation to the issues to be presented to the Court of Appeals upon this appeal.

Dated, June 22nd, 1955.

(S.) Meyer Fix, Attorney for Plaintiff; (S.) Harold J. Tillou, Attorney for Defendant Brotherhood of Railroad Trainmen; (S.) Adams, Smith, Brown & Starrett, Attorney for Pennsylvania Railroad Company, Defendant.

[fol. 65] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955

No. 114

Docket No. 23709

N. P. RYCHLIK, INDIVIDUALLY, AND ON BEHALF OF THOSE SIMILARLY SITUATED, Appellant,

v.

PENNSYLVANIA RAILROAD COMPANY, Defendant-Appellee  
and

BROTHERHOOD OF RAILROAD TRAINMEN, Intervenor-Appellee

OPINION—January 9, 1956

Before Hand, Frank and Medina, Circuit Judges

Appeal from a judgment of the District Court for the Western District of New York—Knight, J., presiding—summarily dismissing a complaint for reinstatement as a member of the intervening union and as an employee of the defendant railroad.

[fol. 66] Norman M. Spindelman, for the appellant.  
Richard N. Clattenberg for the Railroad.  
Harold J. Tillou for the Union.

HAND, Circuit Judge:

The plaintiff appeals from a judgment, summarily dismissing his complaint against the defendant Railway and

the intervening Union (a trades-union of railway conductors and brakemen). The complaint alleged that the plaintiff had been employed as a "trainman" of the Railway at a time when he was a member of the Union, from which he resigned in February, 1953, and in which other "trainmen," on whose behalf he sued, as "similarly situated," had allowed their membership to lapse. Shortly thereafter the plaintiff and the others, "similarly situated," joined another union, which it will be convenient to call U. R. O. C., and which they supposed to be "national in scope." The Railway and the first union had executed a Union Shop Agreement under subdivisions Eleventh, (a) and Eleventh, (c), of § 152 of Title 45, U. S. Code, which required employees to keep up their membership in the Union, or in another union, "National in scope," in order to be eligible as employees of the Railway. In execution of this contract the Union and the Railway had set up a "System Board of Adjustment" under § 153, Second, of Title 45, to appear before which the "Union" cited the plaintiff, and which after a hearing decided that membership in "U.R.O.C." was not a compliance with the Union Shop Agreement. This resulted in depriving the plaintiff and the others, "similarly situated," of employment by the Railway, and he brought this action to procure reinstatement in the Union and reemployment by the Railway.

The plaintiff assumes that the District Court has jurisdiction to issue a mandatory injunction compelling the defendants to accept the plaintiff as a member of the Union and as an employee of the Railway; but we need not decide more at this stage of the case than that in any event the action may stand as one for a declaratory judgment under § 2201, Title 28, U. S. Code. There is an "actual controversy within its" (the District Court's) "jurisdiction," for the plaintiff claims the right to membership and employment by virtue of statutes of the United States.\* Section 2202 allows us to reserve our decision as to what "necessary or proper relief . . . may be granted," if he proves his case upon a trial.

The plaintiff raises two objections to the award of the

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\* § 1337, Title 28, U. S. C.



"System Board": (1) it had no jurisdiction over disputes between a union and its members or past members; and (2) the particular board here involved was disqualified to decide the issues, because two of its four members were members of the Union which the plaintiff and his fellows had abandoned in order to join "U. R. O. C." Our decision in *U. R. O. C. v. Wyer*, 205 Fed. (2) 153 (affirming on his opinion Judge Conger's dismissal of the complaint—115 Fed. Supp. 359), is an answer to the first point. It is true that the case involved the jurisdiction of the National Adjustment Board, and not that of a "System Board," but subdivision § 153, Second, gives to such boards authority to adjust and decide "disputes of the character specified in this section": that is, in subdivision First, which defines the authority of the National Adjustment Board. Indeed, independently of that decision as a precedent, we should have no doubt that the dispute at bar was within § 153, First, (i), as a dispute "between an employee or group of employees and a carrier . . . growing out of the interpretation or application of agreements concerning . . . [fol. 68] working conditions." How far the award of the "System Board," constituted as it was, is exempt from judicial review is indeed a different matter, upon which the courts do not appear to be in entire accord. All that we decided in *U. R. O. C. v. Wyer*, *supra*, was that an aggrieved union or employee must in any event first resort to the appropriate panel—in that case a panel of the National Adjustment Board—before it may apply to a court. Since, however, the text of § 153 applies without reserve to the occasion at bar, the award of the "System Board" will be final, unless either it is proper to imply an exception when half its members are members of the recognized union; or, if that be an unwarranted interpolation, then unless the section is *pro tanto* unconstitutional.

The defendants rely upon the decisions of the Seventh and Sixth Circuits in *U. R. O. C. v. Pennsylvania Railroad*, 212 Fed. (2) 938, and *Pigott v. Detroit, T. & I. R. R. Co.*, 221 Fed. (2) 736. In the first of these the only actual holding was that the "primary jurisdiction" of such disputes as that at bar was in the "System Board"; but the

\* *Slocum v. Delaware, L. & W. R. R. Co.*, 339 U. S. 239.

court went on to discuss the question whether a "competing" union, which the aggrieved employee asserted to be within § 152, Eleventh, (c) was "national in scope," might be decided in a proceeding under § 153, First, (f). The court did not indeed say that such a proceeding was an adequate remedy for any bias of the "System Board"; but we are in doubt as to what other significance the discussion was meant to have. At any rate the Sixth Circuit in the later case had before it an action brought after the employee had failed before the "System Board," in which he and the "competing" union both protested against the ruling of the board because of its presumptive bias; and the court plainly held that a proceeding under § 153, Second, (f) was an adequate remedy. That decision is flatly in favor of the defendants at bar, and if the appeal is to succeed, we must interpret the Act differently, or declare it unconstitutional. Before discussing that question it will make our position plainer, if we say what we understand this supposed alternative remedy to be.

Subdivision (a) of § 153, First, prescribes as one among the qualifications of a union that is to be an elector of unions representing employees in panels of the National Adjustment Board, that it shall be "national in scope." In case a union's claim to be chosen as an elector is disputed, § 153, First, (f) declares that the Secretary of Labor shall first investigate the claim, and, if he decides it "has merit," that he shall notify the Mediation Board. That board will then ask those unions already qualified as electors to select one of their members to serve upon a "board of three" to pass upon the dispute, the applicant itself will select another member, and the Mediation Board will select the third. If the "board of three" grants the application of the union, it will necessarily have found that it is "national in scope"; and the argument appears to be that that is an adequate remedy for any bias of the "System Board," apparently because the finding of the "board of three" on that issue will be final.

With deference we cannot agree with this reasoning. In the first place when a union applies to be chosen as an elector there are other conditions that it must satisfy besides being "national in scope": i.e., it must be "organized

in accordance with" the Act, and it must be "otherwise properly qualified to participate in the selection of the labor members" of the National Board. (§ 153, First, (f).) The "board of three" may of course make a specific finding that the applicant union is not "national in scope," as the ground of refusing to admit it as an elector; but if it fails [fol. 70] to do so, it will be impossible to know whether this was in fact its ground for refusal; and a proceeding that may leave this issue undecided can hardly be intended as a remedy for any bias of the "System Board." Moreover, in any event the decision of the "board of three" would not be an adequate remedy to the employee. If for instance the "competing" union did not wish to be an elector, there is no reason why that should forfeit the employee's right to an impartial tribunal in deciding whether he should hold his job. Employees have no means of compelling the "competing" union to apply to be an elector; and, even if they had, we can see no justification for forcing them to accept that union as a surrogate to assert their right. As we read § 153, Eleventh, (c), their jobs are dependent only upon whether the "competing" union is in fact "national in scope"; and the Act should be construed to grant them the personal privilege of proving their right before an impartial tribunal.

If there is no alternative remedy open to the plaintiffs at bar, there must be some kind of judicial review of the finding against them by the "System Board." Nothing could more completely defeat the most elementary requirement of fair play; and nothing would more firmly entrench the recognized union in power; the temptation to fetch all jobs into that union would ordinarily be irresistible, especially when we remember that the union members of a "System Board" are likely to be persons of consequence in the union itself. Although it is true that *Edwards v. Capital Airlines*, 176 Fed. (2) 755 (C. A. D. C.) arose under other sections of the Act, its *ratio decidendi* applies so exactly to the case at bar that we adopt it as a precedent.

If it be argued that the result of our decision is inevitably to interject the courts into the enforcement of the right granted by § 152, Eleventh, (a), we answer that that is not necessarily true. Section 153, Second, provides that if

[fol. 71] either party to an "arrangement" setting up a "System Board" is dissatisfied, it may "elect to come under the jurisdiction of the Adjustment Board." Whether this implies that, if "dissatisfied," the parties must altogether abandon a "System Board" "arrangement," after they have set it up; or whether it allows them to limit the scope of its jurisdiction, we need not say. If it means the second, it will be possible in the agreement setting up a "System Board" to refer disputes such as that a bar to a panel set up under the National Adjustment Act, which can presumably be made impartial. If it means the first, it would indeed result in making inevitable a court review when a "System Board" decides against an employee in situations like that at bar. We can only answer that in that event there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law.

Judgment reversed; cause remanded for trial in accordance with the foregoing opinion.

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[fols. 72-73] UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT

N. P. RYCHLIK, ETC., Plaintiff-Appellant,

v.

PENNSYLVANIA RAILROAD Co., Defendant-Appellee,

BROTHERHOOD OF RAILROAD TRAINMEN, Intervening-Defendant-Appellee.

JUDGMENT—January 9, 1956

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court

be and it hereby is reversed and action remanded for trial in accordance with the opinion of this Court; with costs taxed in favor of the appellant.

(S.) A. Daniel Fusaro, Clerk.

[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 14, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The Solicitor General is invited to file a brief, as *amicus curiae*.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(408-5)



IN THE  
**Supreme Court of the United States**

October Term, 1956

No. ~~821~~ 56

PENNSYLVANIA RAILROAD COMPANY and BROTHERHOOD  
OF RAILROAD TRAINMEN, *Petitioners*,

v.

N. P. RYCHLIK, individually and on behalf of and as  
representative of other employees of the Pennsylvania  
Railroad, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE  
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April 4, 1956.

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IN THE

**Supreme Court of the United States**

October Term, 1955

\_\_\_\_\_  
No.  
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**PENNSYLVANIA RAILROAD COMPANY and BROTHERHOOD  
OF RAILROAD TRAINMEN, *Petitioners,***

v.

**N. P. RYCHLIK, individually and on behalf of and as  
representative of other employees of the Pennsylvania  
Railroad, *Respondent.***

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**  
\_\_\_\_\_

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on January 9, 1956.

**CITATION TO OPINIONS BELOW**

The opinion of the District Court, printed as Appendix A hereto (*infra*, p. 1a), is reported at 128 F. Supp. 449. The opinion of the Court of Appeals, printed as Appendix B hereto (*infra*, p. 14a), is reported at 229 F. 2d 171.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on January 9, 1956. This petition for a writ of certiorari was filed on April 4, 1956, less than 90 days after the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **QUESTIONS PRESENTED**

1. Does a District Court of the United States have jurisdiction to review the merits of a decision of a System Board of Adjustment, established under Section 3, Second of the Railway Labor Act, in a dispute arising under a union shop agreement solely because representatives of the labor organization representing employees of the carrier are members of such System Board and participate in such decision?

2. Does a District Court of the United States have jurisdiction to review the merits of the decision of a System Board of Adjustment that a labor organization is "national in scope" within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, where Section 3, First (f) of the Railway Labor Act provides an available administrative procedure for final determination of such question, and where such labor organization has failed to follow such available administrative procedure for final determination of its status?

## **STATUTES INVOLVED**

Pertinent provisions of the Railway Labor Act, 45 U. S. C. Secs. 152, 153, are set forth in Appendix C to this petition, p. 20a, *infra*.

### STATEMENT OF THE CASE

On January 28, 1955, respondent filed a complaint in the United States District Court for the Western District of New York against the petitioner Pennsylvania Railroad Co. and the petitioner-intervenor Brotherhood of Railroad Trainmen.

It was alleged that on March 26, 1952, the Pennsylvania and its employees represented by the Brotherhood entered into a union shop agreement, as permitted by Section 2, Eleventh of the Railway Labor Act (R. 8). This agreement provided that, as a condition of their continued employment, these employees must become members of the Brotherhood and maintain membership in good standing, except under specified circumstances (R. 15). The agreement also provided that the requirement of Brotherhood membership was not applicable to employees "who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act" (R. 16).

Having been a member of the Brotherhood in good standing, respondent resigned his membership in February, 1953, and became a member of the United Railroad Operating Crafts (UROC), which he believed in good faith to be a railroad union national in scope (R. 12). Respondent, together with other similarly situated employees, was then cited for non-compliance with the union shop agreement (R. 4-5). He was given a hearing under the agreement before the System Board of Adjustment on or about August 27, 1953, but decision was postponed (R. 12-13). Respondent joined the Switchmen's Union of North America, a union recognized to be national in scope, on July 31,



1954, and has been a member in good standing since that date (R. 6). Evidence of that membership was presented at a further hearing before the System Board on August 23, 1954 (R. 13, 21).

The complaint further alleged that on January 3, 1955, respondent received a letter from the System Board notifying him of the Board's decision that he had not complied with the union shop agreement and that membership in UROC does not constitute compliance with the agreement (R. 13, 21). On or about January 13, 1955, he was notified by the Pennsylvania that he was "out of service" (R. 13-14), a notice that was later confirmed by letter (R. 14). Unnamed fellow employees of respondent also received such notification of their discharge (R. 14).

It was also alleged that after respondent and his unnamed fellow employees had allowed their membership in the Brotherhood to lapse in 1953, they applied for reinstatement. This application was denied by the Brotherhood even though a tender of membership dues had been made (R. 5-6, 8).

On the basis of the foregoing allegations, the complaint asked the District Court to restrain the Brotherhood and the Pennsylvania from continuing the discharge or suspension of respondent and his unnamed fellow employees until they have been given an opportunity for reinstatement or membership in the Brotherhood under the same terms or conditions available to other members (R. 10-11), and from enforcing the union shop agreement to terminate their employment (R. 11). It was charged that their discharge, following the Brotherhood's refusal to reinstate them, was contrary to Section 2, Eleventh (a) of the Railway

Labor Act (R. 6). And since respondent was a member in good standing of the Switchmen's Union since July 31, 1954, his discharge was said to violate Section 2, Eleventh (c) of the Act (R. 6).

The complaint also charged that the union shop agreement was invalid under the Railway Labor Act in that (1) under the Act a System Board of Adjustment does not have jurisdiction over union shop disputes, (2) the Act and general principles of law are violated when the collective bargaining agent, the Brotherhood, is represented on the System Board, and (3) the provisions of the union shop agreement purporting to make the System Board's decisions final and binding are contrary to the Act (R. 8-10). The Brotherhood, in its representation on the Board, was said to be the "accuser, judge, and jury, in respect to the employees' right to work, all of which is in direct conflict with settled principles of American jurisprudence" (R. 9).

The District Court, on petitioners' motion, dismissed the complaint for failure to state a cause of action (R. 42-44). In its opinion (R. 29-41, Appendix A hereto, *infra*, pp. 1a-13a), the court noted that the complaint was silent as to the proceedings before the System Board and no request had been made to review such proceedings. Such a review, even when requested, was held not to extend to the merits of the decision but only to the Board's procedure, the scope of the decision, and factors of fraud or corruption—all matters untouched by the complaint. The court further held that the union shop agreement was valid and that representation of the collective bargaining agent on the System Board did not per se make the agreement in-

valid. It was noted that the complaint contained no allegation of discrimination by a Board member.

The District Court further held that under the Act and the union shop agreement continued membership in a qualified union is a condition of continued employment. The Brotherhood's denial of reinstatement to respondent was held not to be a ground for judicial intervention and respondent's affiliation with the Switchmen's union did not excuse his prior failure to maintain membership in a qualified union.

Finally, the District Court held that the pleadings made it unnecessary to determine the status of UROC and whether membership therein constituted compliance with the union shop agreement. It was noted that determination of whether UROC was a union "national in scope" was left to specific administrative procedure under the Railway Labor Act.

The Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case for trial on the merits. 229 F. 2d 171; Appendix B, p. 14a, *infra*. It held that the System Board of Adjustment had jurisdiction over the matter under Section 3, First (i) of the Act as a dispute growing out of the interpretation or application of agreements concerning working conditions. But it held that the representation of the Brotherhood on the System Board made that Board's determination suspect because of the Brotherhood's presumptive bias against UROC, a competing union whose status as an organization "national in scope" was at issue. And it felt that this supposed bias was not remedied by a proceeding under Section 3, First (f) whereby a three-man board—composed of a representative of qualified

unions, a representative of the union claiming to be "national in scope", and a third member chosen by the National Mediation Board—decides whether the applicant union is "national in scope" and hence is entitled to be an elector of unions representing employees in panels of the National Adjustment Board. Thus the District Court was held to have jurisdiction to review the merits of the System Board's determination.

### REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Second Circuit in this case is in direct and admitted conflict with the decision of the Court of Appeals for the Sixth Circuit in *Pigott v. Detroit, Toledo & Ironton R. Co.* 221 F. 2d 736, certiorari denied, 350 U.S. 833. Fundamentally this conflict involves the reviewability or non-reviewability in court of a System Board decision and involves the availability of a proceeding before a three-man board selected pursuant to Section 3, First (f) as a remedy for any supposed bias by the System Board of Adjustment in determining whether a union is "national in scope".

In the *Pigott* case, the Court of Appeals for the Sixth Circuit held that the procedure outlined in Section 3, First (f) "insures a fair determination, by a three-member board, of the question as to the right of a labor organization to participate in the selection of the labor members of the National Railroad Adjustment Board." 221 F. 2d at 740. And in answer to the contention that such a procedure has no application to a determination whether a union is "national in scope" within the meaning of the union shop provision of the Act, the court held that "appellants are not denied due process of law where there is the right



to secure a fair determination whether their labor organization is 'national in scope' available to them, or, rather, to such labor organization, even though the administrative machinery for making such determination must be availed of in proceedings under the Act to qualify for the right to select members of the National Railroad Adjustment Board." 221 F. 2d at 740. In other words, before a union can qualify as "national in scope" within the exception to the union shop requirement it must also participate in the Adjustment Board machinery and be there recognized as an organization "national in scope". Such was said to be the intention of the drafters of the union shop amendment to the Railway Labor Act.

Judge Hand in writing the opinion below, conceded that the *Pigott* decision "is flatly in favor of the defendants at bar (petitioners), and if the appeal is to succeed, we must interpret the Act differently, or declare it unconstitutional." 229 F. 2d at 174; Appendix B, p. 17a, *infra*. And in its ensuing discussion, the court below construed the Act in a manner completely inconsistent with that adopted by the Court of Appeals for the Sixth Circuit. The court below held that a board of three, selected in accordance with Section 3, First (f) might leave undecided the question whether the applicant union was "national in scope" and hence would not necessarily provide the essential impartial determination. Moreover, said the court below, the union claiming to be "national in scope" might not desire to be an elector for purposes of the National Railroad Adjustment Board; the employee would thus forfeit his right to have an impartial tribunal decide whether he should hold his job. Accordingly, the Act should be construed as granting the employee the



personal privilege of proving his rights through an impartial judicial tribunal rather than being dependent on the uncertain possibility that his union will indirectly assert such rights.

Judge Hand also recognized that the decision below is contradicted by the opinion of the Court of Appeals for the Seventh Circuit in *U.R.O.C. v. Pennsylvania Railroad Co.*, 212 F. 2d 938, where full recognition was given to the availability of the procedure specified in Section 3, First, (f) of the Act, in the event a System Board should determine that a union was not "national in scope" for purposes of the union shop provision.

The existence of the conflict between the decision below and the *Pigott* and *Pennsylvania* decisions warrants the grant of a writ of certiorari to resolve the differing statutory interpretations.

2. The case raises important and novel problems in the administration of the Railway Labor Act that merit review by this Court.

The interpretation of Section 2, Eleventh of the Act adopted by the court below creates an individual cause of action in federal courts which seems inconsistent with the intention of the drafters of that statutory provision. Section 2, Eleventh was enacted by Congress in 1951 as an amendment to the Act and authorized the inclusion of a union shop requirement in collective bargaining agreements. This section, however, excepts employees who belong to certain other unions from the necessity of joining the organization of the bargaining representative. And in defining such qualified alternative unions, the authors of this amendment incorporated into Section 2, Eleventh the

identical qualifications as had originally been set out in Section 3, First (a). This latter section describes which labor organizations are qualified to participate in the selection of labor representatives to the National Railroad Adjustment Board. In both sections the labor organizations must be national in scope and must be organized in accordance with the Act.

Section 2, Eleventh, however, remains silent as to the manner in which these qualifications are to be determined for purposes of the union shop provision. In contrast, Section 3, First (f) provides a specific administrative procedure before a special three-man board for the precise purpose of determining the qualifications of a union seeking to select representatives on the National Railroad Adjustment Board. It would thus seem clear that the drafters of Section 2, Eleventh, in incorporating the qualifications set forth in Section 3, First, must also have intended to adopt the provisions of Section 3, First, for purposes of determining those qualifications.

The findings of these special three-man boards are made "final and binding" by the terms of Section 3, First (f). Thus their findings as to whether a union is "national in scope" and is organized in accordance with the Act are to be accorded finality. And by reference to established doctrines, courts will not exercise jurisdiction over those matters which Congress has committed to the exclusive jurisdiction of agencies created by the Railway Labor Act. *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255; *Order of Railway Conductors v. Pitney*, 326 U. S. 561; *Switchmen's Union v. National Mediation Board*, 320

U. S. 297; *General Committee v. M. K. T. R. Co.*, 320 U. S. 323.

To permit an individual to invoke the jurisdiction of a federal district court to decide the issue as to whether a union is "national in scope" is thus to invade the exclusive jurisdiction over that issue which Congress gave to the special three-man boards under Section 3, First (f). The position adopted by the court below in this case rejects the basic assumption of the Railway Labor Act that family quarrels in the railroad industry should be settled exclusively within the confines of the structures erected by the Act. It opens the door to a variety of judicial interpretations as to whether a particular union is "national in scope", thereby dooming the desirable degree of uniformity which is attainable only within the statutory procedures.

Moreover, the decision below is not confined in its reach to matters involving the status of unions as "national in scope". The language used by the court in describing the presumptive bias of System Boards of Adjustment would seemingly justify invoking the aid of a federal district court whenever an individual who did not belong to the bargaining agent was aggrieved by a System Board determination. A veritable Pandora's box would thereby be opened, throwing into the federal district courts a host of issues arising out of interpretations and disputes as to collective bargaining agreements and working conditions. Here again the basic assumption of the Act—the exclusiveness of the Act's procedures—would be grossly violated.

This Court has held that "in view of the pattern of this legislation and its history the command of the

Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied." *General Committee v. M.K.T.R. Co.*, 320 U. S. 323, 337. Since the decision below creates important and unwarranted exceptions to that principle, review by this Court becomes essential.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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April 4, 1956.

**APPENDIX A****Opinion of Court, Filed February 23, 1955****UNITED STATES DISTRICT COURT****WESTERN DISTRICT OF NEW YORK**

**N. P. RYCHLIK**, individually and on behalf of and as representative of other employees of the Pennsylvania Railroad, *Plaintiff*,

**vs.**

**BROTHERHOOD OF RAILROAD TRAINMEN**, an unincorporated association, *Intervening Defendant*,  
and

**PENNSYLVANIA RAILROAD COMPANY**, *Defendant*.

**Appearances:**

**Meyer Fix**, 500 Powers Building, Rochester, N. Y., Attorney for Plaintiffs.

**Harold J. Tillou**, 501 Erie County Bank Building, Buffalo, New York, Attorney for Intervening Defendant, Brotherhood of Railroad Trainmen.

**Adams, Smith, Brown & Starrett**, Walbridge Building, Buffalo, New York, Attorneys for Defendant, Pennsylvania Railroad Company.

The above entitled matter comes before this Court on an order to show cause obtained by the plaintiff why an order should not be made restraining and granting certain injunctive relief against the defendants, Hartman, Sites, and Gaily, individually and as members of and representatives of the Brotherhood of Railroad Trainmen (hereinafter called "BRT") and the Pennsylvania Railroad (hereinafter called "Penn"). By consent of the parties, the BRT was permitted to intervene as defendants in place of the individuals, Hartman, Sites, and Gaily.

The complaint was verified, and attached thereto was an affidavit of the attorney for the plaintiff, purported to be made on knowledge and not on information and belief. It



will be seen that numerous matters touching the determination herein are included in the affidavit which are not set forth in the complaint. It seems obvious that the attorney could have no personal knowledge of various of the alleged facts set forth in the affidavit. However, in view of the decision at which I arrive, the affidavit of the attorney will be considered.

The defendants have moved to dismiss the complaint on the grounds that the plaintiff has not set forth a cause of action in his complaint; that the Court has no jurisdiction to determine the alleged issues involved; and that the alleged issues are solely within the determination of the System Board of Adjustment established pursuant to the Railroad Labor Act. As alleged in the Complaint, such employees were discharged by Penn upon notice served on or about January 17, 1955 and, as also alleged in the Complaint, during the year 1953 they "allowed their membership to lapse". The plaintiff timely appealed to the System Board of Adjustment and their appeal was pending until January 17, 1955, when the plaintiff was discharged. The delay apparently was caused by the effort to determine whether membership in the United Railroad Operating Crafts (hereinafter referred to as "UROC") constituted compliance with Union Shop Agreement. Meanwhile the plaintiff continued in his employment till his discharge.

A temporary restraining order was sought, but this was refused since the plaintiff had already been discharged. A permanent injunction is now sought for the reinstatement of the plaintiff and his fellow employees on the ground their discharge for non-compliance with the Union Shop Agreement between the BRT and Penn was illegal. A copy of such Agreement was attached as a part of the Complaint. It appears that plaintiff was a member of UROC at the time of his discharge and as appears from the discharge notice set out in the Complaint that plaintiff was discharged because membership in UROC did not constitute compliance with the Union Shop Agreement. (Exhibit A.) The BRT

is a union organization, certified under the Railway Labor Act to represent operating employees of Penn employed as brakemen and conductors on its railroad lines. Plaintiff was a trainman.

On or about the 26th day of March, 1952, BRT and Penn entered into a Union Shop Agreement, pursuant to the provisions of Sec. 2 Eleventh of the Railway Labor Act, as amended. (Exhibit A attached to the Complaint.) Plaintiff asserts that he joined the Switchmen's Union on July 31, 1954 and he presented proof of such membership at a hearing in Pittsburgh, Pa. on August 23, 1954. What his status was as regards UROC then or now does not appear.

In the complaint there is no allegation that the plaintiff became a member of UROC, but the affidavit contains this statement: "In or about February 2, 1953, the plaintiff, Rychlik, resigned his membership from the said BRT and became a member in good standing of the Railroad Operating Crafts, which the plaintiff fully believed in good faith to be a railroad union national in scope.

It is significant that this is made by the attorney for the plaintiff. It also appears from a further statement in such affidavit that plaintiff was a member of the BRT until in or about February, 1953. On August 23, 1954, at Pittsburgh, Penn., the plaintiff presented proofs showing that he had joined the Switchmen's Union of North America on July 31, 1954, and that the plaintiff was a member in good standing in the Switchmen's Union as of the time of the hearing; that since that time he has continued as a member in good standing of the Switchmen's Union of North America, which is recognized as being national in scope. It is alleged that there has been no conclusive determination of the status of the said UROC. On January 3, 1955, plaintiff was notified by the System Board of Adjustment of its decision that he had not complied with the Union Shop Agreement between the Penn. and BRT (Exhibit "B" attached to complaint). On January 14, 1955, he was orally

notified by the defendant company that he was out of the service. On January 17, 1955, he received a written notification of the termination of his service as of January 14, 1955.

There is nothing in the complaint or affidavit which shows that plaintiff ever resigned membership in the UROC.

Section 153, Title 45, insofar as applicable, provides for the composition of Adjustment Boards and provides:

“Section 153

First.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First Division: To have jurisdiction over disputes involving train-and-yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organization of the employees.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.”

Section 152, Title 45, deals with collective bargaining and agreements between carriers and labor organizations and provides, in part:

"Section 152

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter.

\* \* \* a labor organization \* \* \* duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Eleventh.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, \* \* \* if said employee shall hold or acquire membership in any one of the labor organizations, *national in scope*, (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; \* \* \* *Provided; however*, That as to an

employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, *national in scope* (italics supplied) organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him."

In pursuance of the provisions of the Act, the BRT and the Penn. entered into an agreement (Exhibit "A" attached to complaint). Subdivisions 5 and 7 of that agreement are pertinent to the issues herein and provide:

"5. (a) The General Chairman of the Brotherhood will, between the fifteenth day and the last day of any calendar month, furnish to the Superintendent of the Division involved, in writing and in duplicate, the name and roster number of each employee whose seniority and employment the Brotherhood requests be terminated by reason of failure to comply with the membership requirements of this agreement.

(b) In the event that the Superintendent wishes to dispute the correctness of the Brotherhood's position, he shall so notify the General Chairman within ten (10) calendar days of receipt of the notice from the latter, stating the reasons therefor. If no such exception is taken by the Superintendent, or if the General Chairman does not withdraw the notice within ten (10) calendar days from the date of the Superintendent's notice of exception, the Superintendent will transmit to the employee at his last known address through registered United States mail with return receipt requested, the original of the General Chairman's notice, accompanied by an explanatory letter.

(c) Within ten (10) calendar days from the date of the Superintendent mailing notice to the employee, as provided in paragraph (b) of this Section 5, the said employee's seniority and employment in the crafts or classes represented by the Brotherhood shall be terminated, unless the notice is withdrawn by the Brother-



hood in the interim, or unless a proceeding under the provisions of Section 7 of this agreement is instituted.

7. (a) For the sole purpose of handling and disposing of disputes arising under this agreement, a System Board of Adjustment is hereby established, in accordance with Section 3, Second, of the Railway Labor Act, as amended, which shall consist of four members, two to be appointed by the Carrier and two by the Brotherhood.

(b) An employee notified in accordance with the provisions of Section 5 hereof that he has failed to comply with the membership requirements of this agreement and who wishes to dispute the fact of such failure shall, if he submits request to the Secretary of the System Board of Adjustment within a period of ten (10) calendar days from the date of mailing of such notice, be given a hearing. The Secretary of the Board will notify the employee in writing the time and place at which such hearing will be held. The hearing shall be confined exclusively to the question of the employee's compliance with the provisions of this agreement. The employee will be required at this hearing to furnish substantial proof of his compliance with the provisions of this agreement.

(c) The decision of the System Board of Adjustment shall be by majority vote and shall be final and binding."

It appears from the complaint and affidavit herein that this agreement was in effect at the time the plaintiff resigned from the BRT in February of 1953, and that in accordance with that agreement, his grievance was heard before the System Board of Adjustment set up in accordance thereto. The proceedings before said Board were not certified herewith in this action nor was any transcript of the same furnished to the Court; in fact, the complaint itself is silent as to any such proceedings, nor does the prayer of said complaint request that such a review be made by the Court. The affidavit of the attorney for the plaintiff states that the proceedings were conducted before the System

Board of Adjustment and that as a result of said proceedings, the discharge of the plaintiff was ordered. (See Exhibit "B" attached to the affidavit.)

That courts have reviewed proceedings before the System Board of Adjustments is well established.

*Edwards v. Capital Airlines*, 176 F. (2) 755

*Michaels v. National Tube Co.*, 122 Fed. Supp. 726

*Washington Tennessee Co. v. Boswell*, 124 F. (2) 235

But even in those cases where the court reviewed such proceedings, it was held that judicial inquiry is at an end once it is determined (1) That the Board's procedure and the award conform substantially to the Statute and Agreement; (2) That the award confined itself to the letter of submission; and (3) That the award was not arrived at by fraud or corruption. *Farris v. Alaska Airlines*, 113 Fed. Supp. 907; *Moore v. Illinois Central*, 312 U. S. 630. There is nothing before the Court from which it can determine that the procedure and finding before the System Board of Adjustment did not conform substantially to the Statute and Agreement or that the finding of the Board was not confined to the matter submitted to it or that the award was arrived at by fraud or corruption. In *Bauer v. Eastern Airlines*, 214 F. (2) 623, the court, in reviewing the action of the Board had before it the entire administrative record from which it could properly review and pass on the propriety of the same. This Court has not been given the benefit of the record before the Board and of necessity must confine itself to the papers before it. The Court will not consider *de novo* the circumstances of the discharge of the plaintiff. See *Bauer v. Eastern Airlines*, *supra*. This does not mean that in a proper case the court would be foreclosed from considering the essential fairness of the administrative proceeding, even if the issues are raised collaterally, and in a proper case, it would be the duty of the court to determine whether the Board had given the plaintiff a full and fair hearing and exercised its honest judgment in reaching its conclusion.

The fact that the agreement between the BRT and the Railroad provides for a System Board consisting of two representatives of the Railroad and two from the Union does not per se make such an agreement invalid. The courts, in recent years, have had before it for review many cases conducted before Boards of a similar structure and have commented that when a Board is so constituted, the award itself is presumably valid, (*Edwards v. Capital Airlines*, supra) but in a proper proceeding is not immune from judicial examination nor is the fact that some member of the Board might be prejudiced or that they might make an erroneous decision sufficient to give the court jurisdiction. There is no allegation in the complaint or proof submitted that any member of the Board so discriminated against the plaintiff as to bring this case within the rule of *Steele v. Louisville & N. R. Co.*, 323 U. S. 192. The Court is not faced with an agreement illegal in itself which might give it jurisdiction under the *Steele* case, supra. See also *Tunstall v. Brotherhood of Locomotive Firemen, Engineers*, 323 U. S. 210 and *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768. The courts have, on many occasions, distinguished between the *Steele*, *Tunstall*, and *Howard* cases, supra, and cases such as the case at bar which involves the interpretation or application of agreements, and that distinction has been made clear in many decisions, e. g., *Spires v. Southern Railway Co.*, 204 F. (2) 453; *Hayes v. Union Pacific Railroad Co.*, 184 F. (2) 337; *United Railroad Operating Crafts v. Northern Pacific Railroad Co.*, 208 F. (2) 135, cert. den. 347 U. S. 929; and *United Railroad Operating Crafts v. Pennsylvania Railroad*, 212 F. (2) 938.

In the instant case, neither the Railroad nor the Brotherhood has filed any answer, but the question of jurisdiction and sufficiency of the complaint have been raised by both, and the Court, in any event, would be bound to consider such questions even if not raised. *U. S. v. Corrick*, 298 U. S. 435, *United R. R. Operating Crafts v. Pennsylvania Railroad*, 221 F. (2) 938; and the recent case of *Alabaugh v.*

*Baltimore & Ohio Railroad Co.*, 125 Fed. Supp. 401. This Court, on the facts presented, finds no invalidity in the agreement.

The plaintiff claims that after his resignation in the BRT, the BRT refused to reinstate him. There appears to be no grounds for the equitable intervention of this Court for such refusal. A like question was discussed by the court in *Alabaugh v. Baltimore & Ohio Railroad Co.*, supra, wherein the court, at page 407, said:

"When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B & O which requires such action.

The courts cannot require individuals or associations to be forgiving or generous nor prevent the operation of the rule that "they that take the sword shall perish with the sword" unless some constitutional or other legal right or immunity is threatened. Nor does the action of Brotherhood in reinstating some members who had been less active in UROC create any right in plaintiffs to secure an order for reinstatement in this case.

So far as Brotherhood's refusal to reinstate plaintiffs affects their discharge by B & O, it is clearly a dispute similar to those which the courts have held to be within the primary jurisdiction of the Adjustment Board."

The plaintiff also claims that at the time of his discharge, he was a member of the Switchmen's Union of North America, a union "national in scope", recognizable under the Railroad Act. Unquestionably, the Act itself does not require any employee to belong to any particular Union as long as it has been recognized as national in scope and the majority of any craft have the right to determine who shall be the representatives of the craft or class (Sec. 152, Title 45, U.S.C.), and that nothing in any agreement shall prevent the employee from changing membership from one organization to another organization (Sec. 152, Eleventh

(c), Title 45, U.S.C.) It would appear that the Act, however, contemplates the continued membership in a Union national in scope. That the BRT and Switchmen's Union are such is admitted. The plaintiff in the instant case ceased, by his own act, his membership in BRT and did not join the Switchmen's Union until shortly before his final hearing before the System Board in August 1954, although he had been cited before the Board and given a hearing as early as August of 1953. Judge Thomsen, in the *Alabaugh* case, at pages 406 and 407, stated:

"Maintenance of membership within the contemplation of that amendment means continued payment of dues to a qualifying union. The reason for such requirement is obvious, and is discussed in *Pigott v. Detroit T. & I. R. Co.*, 116 Fed. Supp. at 955, note 11. In the case at bar plaintiffs withdrew from the Brotherhood and stopped paying dues to it. For that reason they were expelled by Brotherhood, and are being discharged by B & O."

And again:

"Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). \* \* \* But they have chosen to stake all on UROC. Having lost, they sought reinstatement in Brotherhood."

I therefore hold that the Statute itself contemplates continued membership in a qualified union and that that question was one for proper determination in the first instance by the System Board of Adjustment. The plaintiff, in his brief, has requested this Court to pass on the question as to whether UROC is national in scope.



It is not necessary for this Court to decide under the facts submitted in this case whether UROC is a labor organization "national in scope." In fact, that function, under the Railway Act, is left to specific administrative procedure. The National Mediation Board, provided for in Section 154, Title 45, U.S.C., and consisting of three public members appointed by the President, is authorized (Sec. 152, Ninth, 45 USC) whenever a jurisdictional dispute arises between rival unions, to investigate such dispute and then to certify the union which is to act as bargaining representative for the employees in question. Such certifications are held to be exclusively within the competency of the National Mediation Board and its decisions are conclusive and not subject to review. *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297; *General Committee v. Missouri K. T. R. Co.*, 320 U. S. 323.) In the latter case, the court said:

"However wide may be the range of jurisdictional disputes embraced within Section 2, Ninth, Congress did not select the Courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board."

The special administrative procedure of Section 153 is therefore vested with exclusive jurisdiction to determine whether a labor organization is national in scope and organized in accordance with the Act when a dispute arises pursuant to the right of the labor organization to participate in the National Railroad Adjustment Board machinery as said in *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949 (1953) at page 954:

"It is the type of issue which those that are conversant with the specialized problems of the railroad industry are most capable of evaluating."

Again, the court, in the *Pigott* case, remarked:

"If the question of its status were open to the courts, which are located in various areas of the nation, it is

conceivable that such different jurisdictions would reach contrary conclusions if concurrent suits with separate carriers were to be litigated."

For the reasons stated herein, the Court denies the application for an injunction pendente lite and the motion to dismiss the complaint is granted. (Entry of the order herein, however, will be delayed for the period of one week to afford the plaintiffs opportunity to apply for an injunction pending appeal if they decide to appeal.

JOHN KNIGHT

*United States District Judge*

February 23, 1955.

## APPENDIX B

## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 114—October Term, 1955.

(Argued November 17, 1955      Decided January 9, 1956)

Docket No. 23709

N. P. RYCHLIK, individually, and on behalf of those similarly situated, *Appellant*,

v.

PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellee*,  
andBROTHERHOOD OF RAILROAD TRAINMEN, *Intervenor-Appellee*.

Before:

HAND, FRANK AND MEDINA, *Circuit Judges*.

Appeal from a judgment of the District Court for the Western District of New York—Knight, J., presiding—summarily dismissing a complaint for reinstatement as a member of the intervening union and as an employee of the defendant railroad.

NORMAN M. SPINDELMAN *for the appellant*.RICHARD N. CLATTENBERG *for the Railroad*.HAROLD J. TILLOU *for the Union*.HAND, *Circuit Judge*:

The plaintiff appeals from a judgment, summarily dismissing his complaint against the defendant Railway and the intervening Union (a trades-union of railway conductors and brakemen). The complaint alleged that the plaintiff had been employed as a "trainman" of the Railway at a time when he was a member of the Union, from which he

resigned in February, 1953, and in which other "trainmen," on whose behalf he sued, as "similarly situated," had allowed their membership to lapse. Shortly thereafter the plaintiff and the others, "similarly situated," joined another union, which it will be convenient to call U. R. O. C., and which they supposed to be "national in scope." The Railway and the first union had executed a Union Shop Agreement under subdivisions Eleventh, (a) and Eleventh, (c), of §152 of Title 45, U. S. Code, which required employees to keep up their membership in the Union, or in another union, "national in scope," in order to be eligible as employees of the Railway. In execution of this contract the Union and the Railway had set up a "System Board of Adjustment" under §153, Second, of Title 45, to appear before which the "Union" cited the plaintiff, and which after a hearing decided that membership in "U. R. O. C." was not a compliance with the Union Shop Agreement. This resulted in depriving the plaintiff and the others, "similarly situated," of employment by the Railway, and he brought this action to procure reinstatement in the Union and reemployment by the Railway.

The plaintiff assumes that the District Court has jurisdiction to issue a mandatory injunction compelling the defendants to accept the plaintiff as a member of the Union and as an employee of the Railway; but we need not decide more at this stage of the case than that in any event the action may stand as one for a declaratory judgment under §2201, Title 28, U. S. Code. There is an "actual controversy within its" (the District Court's) "jurisdiction," for the plaintiff claims the right to membership and employment by virtue of statutes of the United States.\* Section 2202 allows us to reserve our decision as to what "necessary or proper relief . . . may be granted," if he proves his case upon a trial.

The plaintiff raises two objections to the award of the "System Board": (1) it had no jurisdiction over disputes

\* §1337, Title 28, U. S. C.

between a union and its members or past members; and (2) the particular board here involved was disqualified to decide the issues, because two of its four members were members of the Union which the plaintiff and his fellows had abandoned in order to join "U. R. O. C." Our decision in *U. R. O. C. v. Wyer*, 205 Fed. (2) 153 (affirming on his opinion Judge Conger's dismissal of the complaint—115 Fed. Supp. 359), is an answer to the first point. It is true that the case involved the jurisdiction of the National Adjustment Board, and not that of a "System Board," but subdivision §153, Second, gives to such boards authority to adjust and decide "disputes of the character specified in this section": that is, in subdivision First, which defines the authority of the National Adjustment Board. Indeed, independently of that decision as a precedent, we should have no doubt that the dispute at bar was within §153, First, (i), as a dispute "between an employee or group of employees and a carrier \* \* \* growing out of the interpretation or application of agreements concerning \* \* \* working conditions." How far the award of the "System Board," constituted as it was, is exempt from judicial review is indeed a different matter, upon which the courts do not appear to be in entire accord. All that we decided in *U. R. O. C. v. Wyer*, *supra*, was that an aggrieved union or employee must in any event first resort to the appropriate panel—in that case a panel of the National Adjustment Board—before it may apply to a court. Since, however, the text of §153 applies without reserve to the occasion at bar, the award of the "System Board" will be final, unless either it is proper to imply an exception when half its members are members of the recognized union; or, if that be an unwarranted interpolation, then unless the section is *pro tanto* unconstitutional.

The defendants rely upon the decisions of the Seventh and Sixth Circuits in *U. R. O. C. v. Pennsylvania Railroad*, 212 Fed. (2) 938, and *Pigott v. Detroit, T. & I. R.R. Co.*, 221 Fed. (2) 736. In the first of these the only actual holding was that the "primary jurisdiction" of such disputes



as that at bar was in the "System Board";\* but the court went on to discuss the question whether a "competing" union, which the aggrieved employee asserted to be within §152, Eleventh, (c), was "national in scope," might be decided in a proceeding under §153, First, (f). The court did not indeed say that such a proceeding was an adequate remedy for any bias of the "System Board"; but we are in doubt as to what other significance the discussion was meant to have. At any rate the Sixth Circuit in the later case had before it an action brought after the employee had failed before the "System Board," in which he and the "competing" union both protested against the ruling of the board because of its presumptive bias; and the court plainly held that a proceeding under §153, Second, (f) was an adequate remedy. That decision is flatly in favor of the defendants at bar, and if the appeal is to succeed, we must interpret the Act differently, or declare it unconstitutional. Before discussing that question it will make our position plainer, if we say what we understand this supposed alternative remedy to be.

Subdivision (a) of §153, First, prescribes as one among the qualifications of a union that is to be an elector of unions representing employees in panels of the National Adjustment Board, that it shall be "national in scope." In case a union's claim to be chosen as an elector is disputed, §153, First, (f) declares that the Secretary of Labor shall first investigate the claim, and, if he decides it "has merit," that he shall notify the Mediation Board. That board will then ask those unions already qualified as electors to select one of their members to serve upon a "board of three" to pass upon the dispute, the applicant itself will select another member, and the Mediation Board will select the third. If the "board of three" grants the application of the union, it will necessarily have found that it is "national in scope"; and the argument appears to be that that is an adequate remedy for any bias of the "System Board," ap-

\* *Slocum v. Delaware, L. & W. R.R. Co.*, 339 U. S. 239.

parently because the finding of the "board of three" on that issue will be final.

With deference we cannot agree with this reasoning. In the first place when a union applies to be chosen as an elector, there are other conditions that it must satisfy besides being "national in scope"; *i. e.*, it must be "organized in accordance with" the Act, and it must be "otherwise properly qualified to participate in the selection of the labor members" of the National Board. (§ 3 First, (f).) The "board of three" may of course make a specific finding that the applicant union is not "national in scope," as the ground of refusing to admit it as an elector; but if it fails to do so, it will be impossible to know whether this was in fact its ground for refusal; and a proceeding that may leave this issue undecided can hardly be intended as a remedy for any bias of the "System Board." Moreover, in any event the decision of the "board of three" would not be an adequate remedy to the employee. If for instance the "competing" union did not wish to be an elector, there is no reason why that should forfeit the employee's right to an impartial tribunal in deciding whether he should hold his job. Employees have no means of compelling the "competing" union to apply to be an elector; and, even if they had, we can see no justification for forcing them to accept that union as a surrogate to assert their right. As we read §153, Eleventh; (c), their jobs are dependent only upon whether the "competing" union is in fact "national in scope"; and the Act should be construed to grant them the personal privilege of proving their right before an impartial tribunal.

If there is no alternative remedy open to the plaintiffs at bar, there must be some kind of judicial review of the finding against them by the "System Board." Nothing could more completely defeat the most elementary requirement of fair play; and nothing would more firmly entrench the recognized union in power; the temptation to fetch all jobs into that union would ordinarily be irresistible, espe-

cially when we remember that the union members of a "System Board" are likely to be persons of consequence in the union itself. Although it is true that *Edwards v. Capital Airlines*, 176 Fed. (2) 755 (C. A. D. C.) arose under other sections of the Act, its *ratio decidendi* applies so exactly to the case at bar that we adopt it as a precedent.

If it be argued that the result of our decision is inevitably to interject the courts into the enforcement of the right granted by §152, Eleventh, (a), we answer that that is not necessarily true. Section 153, Second, provides that if either party to an "arrangement" setting up a "System Board" is dissatisfied, it may "elect to come under the jurisdiction of the Adjustment Board." Whether this implies that, if "dissatisfied," the parties must altogether abandon a "System Board" "arrangement," after they have set it up; or whether it allows them to limit the scope of its jurisdiction, we need not say. If it means the second, it will be possible in the agreement setting up a "System Board" to refer disputes such as that at bar to a panel set up under the National Adjustment Act, which can presumably be made impartial. If it means the first, it would indeed result in making inevitable a court review when a "System Board" decides against an employee in situations like that at bar. We can only answer that in that event there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law.

Judgment reversed; cause remanded for trial in accordance with the foregoing opinion.

**APPENDIX C****Relevant Statutory Provisions**

Sections 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1186, 1189, 64 Stat. 1238; 45 U. S. C. §§152, 153) provide in part as follows:

**"Section 2: \* \* \***

**"Eleventh.** Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

**"(a)** to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

**"(b)** to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties uniformly required as a condition of acquiring or retaining membership:

Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him; Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organi-



zation to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

“SEC. 3. First. There is hereby established a Board, to be known as the ‘National Railroad Adjustment Board’, the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

“(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

“(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

“(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

“(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

“(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

“(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is likewise properly qualified to participate in the selection

of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

“(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

“First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

“Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

“Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees,

freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members five of whom shall be selected by the carriers and five by the national labor organizations of employees.

“Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

“(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

“(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

“(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when prop-

erly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

“(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as ‘referee’, to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board should be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

“(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the representative parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

“(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.



“(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum of which he is entitled under the award on or before a day named.

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

“(q) All actions at law based upon the provisions of this section shall be begun with two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, form mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

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No. 56

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

PENNSYLVANIA RAILROAD COMPANY and BROTHERHOOD  
OF RAILROAD TRAINMEN, *Petitioners*,

v.

N. P. RYCHLIK, individually and on behalf of and as  
representative of other employees of the Pennsylvania  
Railroad, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, THE PENNSYLVANIA  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1956.

---

No. 56

---

PENNSYLVANIA RAILROAD COMPANY and BROTHERHOOD  
OF RAILROAD TRAINMEN, *Petitioners*,

v.

N. P. RYCHLIK, individually and on behalf of and as  
representative of other employees of the Pennsylvania  
Railroad, *Respondent*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**BRIEF FOR PETITIONER, THE PENNSYLVANIA  
RAILROAD COMPANY**

---

**OPINIONS BELOW**

The opinion of the United States District Court for  
the Western District of New York (R. 22-34) is  
reported at 128 F. Supp. 449.

The opinion of the United States Court of Appeals  
for the Second Circuit (R. 39-44) was handed down  
on January 9, 1956, and is reported at 229 F. (2d) 171.

### **JURISDICTION**

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on January 9, 1956. Petitioners' joint petition for writ of certiorari was filed on April 4, 1956, less than 90 days after the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

### **STATUTES INVOLVED**

This suit involves Section 2, Eleventh of the Railway Labor Act, as amended (45 U.S.C. § 152, Eleventh; 64 Stat. 1238) which removes the prohibition against union shop agreements between railroads and the labor organizations representing their employees; and Section 3 of the Act (45 U.S.C. § 153; 48 Stat. 1189) which provides for the establishment of the National Railroad Adjustment Board, or in lieu thereof, of system, group or regional boards of adjustment, for the purpose of adjusting and deciding disputes between the railroads and their employees. Section 2, Eleventh and the pertinent provisions of Section 3 of the Act are set forth in the Appendix, pp. 50-56, *infra*.

### **QUESTIONS PRESENTED**

1. Does a District Court of the United States have jurisdiction to review the merits of a decision of a System Board of Adjustment, established under Section 3, Second of the Railway Labor Act, in a dispute arising under a union shop agreement solely because representatives of the labor organization representing employees of the carrier are members of such System Board and participate in such decision?

2. Does a District Court of the United States have jurisdiction to review the merits of a decision of a System Board of Adjustment which includes a finding that a labor organization is not "national in scope" within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, where Section 3, First (f) of the Railway Labor Act provides an administrative procedure for final determination of such question, and where such labor organization has failed to follow such available administrative procedure for final determination of its status?

#### **STATEMENT OF THE CASE**

Respondent N. P. Rychlik was employed by petitioner The Pennsylvania Railroad Company (hereinafter referred to as "Pennsylvania") as a Trainman on Pennsylvania's lines running out of Buffalo, New York, until January 14, 1955. He had been so employed for more than two years (Complaint, par. 1; R. 3).

Petitioner Brotherhood of Railroad Trainmen (hereinafter referred to as "B.R.T.") is the labor organization duly certified under the Railway Labor Act as the collective bargaining representative of Trainmen employed by Pennsylvania (Complaint, par. 2; R. 3).

On March 26, 1952 Pennsylvania and its employees represented by B.R.T. entered into a Union Shop Agreement, in accordance with Section 2, Eleventh of the Railway Labor Act (Complaint, par. 18; R. 7). This Agreement (Exhibit A attached to Complaint; R. 12-17) provided that employees represented by B.R.T., as a condition of their continued employment,

must become members of B.R.T. and maintain membership in good standing in B.R.T., except under specified circumstances (R. 13).

Prior to February, 1943, respondent Rychlik was a member in good standing of B.R.T. (Affidavit of Meyer Fix, par. 2; R. 10). In or about February, 1953, respondent Rychlik resigned his membership in B.R.T. (Affidavit par. 3; R. 10). During the year 1953 other employees of Pennsylvania, like respondent, allowed their membership in B.R.T. to lapse (Complaint, par. 5; R. 4). In or about February, 1953, respondent became a member of United Railroad Operating Crafts (hereinafter referred to as "UROC") which he believed in good faith to be a railroad union national in scope (Affidavit par. 3; R. 10).

Sometime after February, 1953, respondent was cited for non-compliance with the Union Shop Agreement (Affidavit par. 4; R. 10) as were other employees of Pennsylvania who allowed their membership in B.R.T. to lapse (Complaint par. 5; R. 4). Respondent was given a hearing under the Union Shop Agreement before the System Board of Adjustment on or about August 27, 1953, but decision was postponed (Affidavit par. 4; R. 10).

Respondent joined the Switchmen's Union of North America, a union recognized to be national in scope, on July 31, 1954 and has been a member thereof in good standing since that date. Respondent was given a further hearing before the System Board on August 23, 1954. (Complaint par. 10, R. 5; Affidavit pars. 5 and 6, R. 11).



On January 3, 1955, respondent received a letter from the System Board of Adjustment notifying him of the Board's decision that he had not complied with the Union Shop Agreement (Affidavit par. 7; R. 11). On or about January 14, 1955 respondent was notified by Pennsylvania by telephone that he was out of service (Affidavit par. 8; R. 11). This notice was confirmed by a letter sent to respondent by Pennsylvania and received by him on or about January 17, 1955 (Affidavit par. 10; R. 12).

Unnamed fellow employees of respondent also received telephone notification of their discharge and subsequent written confirmation (Affidavit par. 11; R. 12).

At some unspecified time after respondent and unnamed fellow employees allowed their membership in B.R.T. to lapse during the year 1953, they applied for reinstatement in B.R.T., which B.R.T. denied (Complaint pars. 5, 7, 8, and 9; R. 4), although respondent and his fellow employees made tender of membership dues (Complaint par. 16; R. 6).

On January 28, 1955 after his discharge, respondent filed a complaint in the United States District Court for the Western District of New York against petitioners Pennsylvania and B.R.T. The complaint and affidavit attached thereto alleged the facts outlined above, and the complaint asked the District Court to restrain B.R.T. and Pennsylvania from continuing the discharge or suspension of respondent and his unnamed fellow employees until they have been given an opportunity for reinstatement or membership in the B.R.T. under the same terms or conditions available to other members (R. 8-9), and from

enforcing the union shop agreement to terminate their employment (R. 9)... It was charged that their discharge, following B.R.T.'s refusal to reinstate them, was contrary to Section 2, Eleventh (a) of the Railway Labor Act (R. 5). And since respondent was a member in good standing of the Switchmen's Union since July 31, 1954, his discharge was said to violate Section 2, Eleventh (c) of the Act (R. 5).

The complaint also charged that the union shop agreement was invalid under the Railway Labor Act in that (1) under the Act a System Board of Adjustment does not have jurisdiction over union shop disputes, (2) the Act and general principles of law are violated when the collective bargaining agent, B.R.T., is represented on the System Board, and (3) the provisions of the union shop agreement purporting to make the System Board's decisions final and binding are contrary to the Act (R. 7-8). B.R.T., in its representation on the Board, was said to be the "accuser, judge, and jury, in respect to the employees' right to work, all of which is in direct conflict with settled principles of American jurisprudence" (R. 8).

The District Court, on petitioners' motions, dismissed the complaint for failure to state a cause of action (R. 34-36). In its opinion (R. 22-34), the court noted that the complaint was silent as to the proceedings before the System Board and no request had been made to review such proceedings. Such a review, even when requested, was held not to extend to the merits of the decision but only to the Board's procedure, the scope of the decision, and factors of fraud or corruption—all matters untouched by the complaint (R. 29). The court further held that the union shop

agreement was valid and that representation of the collective bargaining agent on the System Board did not *per se* make the agreement invalid (R. 30). It was noted that the complaint contained no allegation of discrimination by a Board member.

The District Court further held that under the Act and the union shop agreement continued membership in a qualified union is a condition of continued employment.<sup>1</sup> The Brotherhood's denial of reinstatement to respondent was held not to be a ground for judicial intervention (R. 31) and respondent's affiliation with the Switchmen's union did not excuse his prior failure to maintain membership in a qualified union under (R. 31-32).<sup>1</sup>

Finally, the District Court held that the pleadings made it unnecessary to determine the status of UROC and whether membership therein constituted compliance with the union shop agreement. It was noted that determination of whether UROC was a union "national in scope" was left to specific administrative procedure under the Railway Labor Act (R. 33).

The Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case for trial on the merits (229 F. 2d 171; R. 39-44). It held that the System Board of Adjustment had jurisdiction over the matter under Section 3, First (i) of the Act as a dispute growing out of the interpretation or application of agreements concerning working conditions. But it held that the

<sup>1</sup> The District Court below decided these points adversely to the respondent, and although raised on appeal, these contentions were not mentioned in the opinion of the Court of Appeals below and are not now before this Court.

representation of the Brotherhood on the System Board made that Board's determination suspect because of the Brotherhood's presumptive bias against UROC, a competing union whose status as an organization "national in scope" was at issue. And it felt that this supposed bias was not remedied by a proceeding under Section 3, First (f) whereby a three-man board—composed of a representative of qualified unions, a representative of the union claiming to be "national in scope", and a third member chosen by the National Mediation Board—decides whether the applicant union is "national in scope" and hence is entitled to participate in the selection of members of the National Railroad Adjustment Board. Thus the District Court was held to have jurisdiction to review the merits of the System Board's determination.

#### **SUMMARY OF ARGUMENT**

The decision of the Court of Appeals below should be reversed by this Court because:

1. Traditionally the administrative boards established under the Railway Labor Act to decide disputes between railroads and their employees have been bipartisan boards, made up of representatives of the railroads and of the labor organizations. Equally traditionally, the decisions of such boards have been held to be final and binding, subject to review on the merits only where express authority for such review is provided by the Act.

2. No unusual factors are present in a dispute under a union shop agreement which may not be present in any dispute between a railroad and its employees. There are many situations under collectively bargained

agreements where the interests of individual employees and of their collective bargaining agents may be opposed, resulting in disputes within the jurisdiction of the boards on which the collective bargaining agents are represented. Unless the courts are to be thrown wide open for the interpretation and application of collectively bargained agreements in the railroad industry, the presumption must be that the proceedings of such boards are without bias. Where bias is shown, a board award may be vacated or stayed pending further proceedings under the Railway Labor Act.

3. This Court has consistently held that the means provided by the Railway Labor Act for determining and settling disputes between railroads and their employees are exclusive remedies which oust the courts of jurisdiction except in narrowly limited situations. Review of the merits of board decisions will involve the courts in the interpretation and application of railroad collective bargaining agreements, which is a function that Congress has given exclusively to these administrative boards.

4. The Railway Labor Act provides an administrative procedure for determining whether UROC is "national in scope", the only substantial issue raised by respondent before the System Board in defending the charge of non-compliance with the union shop agreement. Under well-established principles, this issue should be determined only by the means established by the Act. The fact that the issue is raised by respondent and other individual members of UROC, rather than by UROC itself, does not create jurisdiction in the courts to decide this administrative



question. Court jurisdiction over this issue, furthermore, will render uncertain the application of union shop agreements and the status of employees under such agreements.

### ARGUMENT

I. DECISIONS OF THE BIPARTISAN BOARDS, INCLUDING SYSTEM BOARDS OF ADJUSTMENT, ESTABLISHED UNDER SECTION 3 OF THE RAILWAY LABOR ACT, ARE NOT SUBJECT TO COURT REVIEW ON THE MERITS EXCEPT IN THE MANNER PROVIDED BY THE ACT, THAT IS, IN ENFORCEMENT PROCEEDINGS.

For thirty years Congress through the Railway Labor Act has entrusted the settlement of disputes between railroads and their employees to bipartisan boards established under that Act.

The Railway Labor Act of 1926 (44 Stat. 577) provided in Section 3 (44 Stat. 578) for the establishment of boards of adjustment by agreement between any carrier or group of carriers or the carriers as a whole and the employees. The Act provided that these boards of adjustment should have jurisdiction over disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. The decisions of the adjustment boards established under the Act were final and binding on both parties to the dispute. The Act provided for equal representation of the carrier and the employees on the adjustment board with power in a majority of the adjustment board members to render a binding award.<sup>2</sup>

<sup>2</sup> Section 3 of the Railway Labor Act of 1926 (44 Stat. 578) reads as follows:

"First. Boards of adjustment shall be created by agreement

The 1934 amendments to the Railway Labor Act amended Section 3 of the Act to establish the National Railroad Adjustment Board (45 U.S.C. § 153, First, Appendix *infra*, p. 51). They also preserved the right of the railroads and their employees to establish system, group or regional boards of adjustment with

between any carrier or group of carriers, or the carriers as a whole, and its or their employees.

"The agreement—

"(a) Shall be in writing;

"(b) Shall state the group or groups of employees covered by such adjustment board;

"(c) Shall provide that disputes between an employee or group of employees and a carrier, growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, that the dispute shall be referred to the designated adjustment board by the parties, or by either party, with a full statement of the facts and all supporting data bearing upon the dispute;

"(d) Shall provide that the parties may be heard either in person, by counsel, or by other representative, as they may respectively elect, and that adjustment boards shall hear and, if possible, decide promptly all disputes referred to them as provided in paragraph (c). Adjustment boards shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in the dispute;

"(e) Shall stipulate that decisions of adjustment boards shall be final and binding on both parties to the dispute; and it shall be the duty of both to abide by such decisions;

"(f) Shall state the number of representatives of the employees and the number of representatives of the carrier or carriers on the adjustment board, which number of representatives, respectively, shall be equal;

"(g) Shall provide for the method of selecting members and filling vacancies;

"(h) Shall provide for the portion of expenses to be assumed by the respective parties;

"(i) Shall stipulate that a majority of the adjustment board

jurisdiction over these railroad labor disputes (45 U.S.C. § 153 Second; Appendix *infra*, p. 56).

Like the former boards of adjustment provided for in the 1926 Act, the National Railroad Adjustment Board is established as a bipartisan board with equal representation of the railroads and of the employees. The procedural requirements of Section 3, First of the Act with regard to the handling of disputes by the National Railroad Adjustment Board are quite similar to those established by the 1926 Act for the boards of adjustment. Under the 1934 amendments there are no specific requirements as to the form of system, group or regional boards of adjustment established under Section 3, Second but the pattern for such boards which was set by the 1926 Act has generally been followed by the railroads and their employees when they have determined to provide such boards of adjustment to handle disputes in lieu of the National Railroad Adjustment Board.

Thus the System Board of Adjustment provided for by the union shop agreement between petitioners Pennsylvania and B.R.T. (Exhibit "A" attached to the complaint, par. 7; R. 15) is a bipartisan board with two members appointed by the Pennsylvania and two by B.R.T.; provision is made for a hearing and notice

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members shall be competent to make an award, unless otherwise mutually agreed;

"(j) Shall stipulate that adjustment boards shall meet regularly at such times and places as designated; and

"(k) Shall provide for the method of advising the employees and carrier or carriers of the decisions of the board.

"Second. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish."

to the employee of the hearing; and it is provided that disputes of the System Board shall be by majority vote and shall be final and binding.

Throughout the 30-year period that these boards provided for by Congress in the Railway Labor Act have been functioning, it has been almost universally held that the findings of such boards on the merits of disputes are not subject to review in the courts. The courts have held that these administrative boards are intended by Congress to have exclusive jurisdiction over the interpretation and application of collectively bargained agreements in the railroad industry, and that whereas the procedure of such boards may be subject to review, the courts will not take jurisdiction of the merits of the disputes even while exercising the judicial power to void decisions of such boards because of procedural deficiencies.

This principle was established in one of the earliest cases involving the validity of an award of a System Board of Adjustment, *Brand, et al. v. Pennsylvania Railroad Company*, 2 LC par. 18489 (D.C. E.D. Pa. 1939). In the *Brand* case plaintiffs were a group of employees who had been furloughed during depression years and on return to service were given their original pre-depression seniority dates. This action by the railroad was attacked by another group of employees who had been adversely affected and who were supported in their position by the collective bargaining agent. The protesting employees took the dispute to a System Board of Adjustment, established under Section 3, Second of the Railway Labor Act. The System Board of Adjustment thereafter issued an award sustaining

the position of the protesting employees, without giving any notice to the plaintiffs of the proceedings and without giving them any right to appear to present their position to the board. Thereafter the railroad deprived the plaintiffs of the seniority dates which had been accorded to them, and the plaintiffs brought suit in the United States District Court to set aside the award of the board and to secure a mandatory injunction upon the railroad to restore them to their previous seniority.

The District Court set aside the award of the System Board of Adjustment as void for lack of notice to the plaintiffs but refused to pass on the merits of the dispute. The court said that the dispute as to the application of the seniority rules of the collectively bargained agreement was in the exclusive province of the board to determine, and the court could express no opinion on the merits of the dispute. The court said that its concern was solely with the question of whether the proceedings were in any respect irregular and whether the plaintiffs were given a fair and proper opportunity to protect their interests.

One of the contentions made by the defense in the *Brand* case was that notice to the collective bargaining agent was notice to the plaintiffs. This contention was rejected by the court on the ground that since the collective bargaining agent had taken the opposing side in the dispute it could not be held to represent the plaintiffs. It is interesting to note that although the court took note of the fact that the collective bargaining agent presented the case for the protesting employees to the System Board of Adjustment and had a representative on the System Board of Adjust-



ment, there is no indication in the opinion that these circumstances in themselves affected the validity of the findings of the System Board of Adjustment, the award being set aside solely on the ground of failure to give plaintiffs notice and an opportunity to appear.

The subsequent cases have sustained and strengthened this view that the courts do not have jurisdiction to review the merits of decisions of the boards established by Section 3 of the Railway Labor Act because the interpretation and application of railroad collectively bargained agreements has been given by Congress exclusively to these administrative boards.

In *Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907 (D.C. Wash. 1953), plaintiff brought suit for damages for wrongful discharge after a claim for reinstatement had been denied by a System Board of Adjustment established under Section 204 of Title II of the Railway Labor Act.<sup>3</sup>

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<sup>3</sup> Section 204 of Title II of the Railway Labor Act, applicable to carriers by air, provides for the establishment of boards of adjustment directly comparable to those provided for in Section 3, Second of the Act. Section 204 of Title II of the Act reads as follows:

“SEC. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

“It shall be the duty of every carrier and of its employees, act-

The court held that the decision of the System Board was final and binding in accordance with the terms of the agreement under which it had been established. The court further held that it had no jurisdiction to review the decision of the System Board on the merits but could inquire only whether (1) the board's procedure conformed substantially to the statute and the agreement; (2) whether the award confined itself to the submission made to the board; and (3) whether the award was arrived at by fraud or corruption. Finding no substantial irregularities in the board's award the court held that judgment should be entered for the defendant.

In a similar case, *Bower v. Eastern Airlines, Inc.*, 214 F.2d 623 (CCA 3d 1954), cert. den. 348 U.S. 871 (1954) the court again held that the merits of a decision of a System Board of Adjustment could not be reviewed by a court. The court limited review to questions of the jurisdiction and procedure of the System Board and to determining whether the board gave plaintiff a full and fair hearing and exercised

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ing through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

"Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group or carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction."

its honest judgment in reaching its conclusions and decision on the full record. In *Sigfried v. Pan American World Airways*, 230 F.2d 13 (CCA 5th 1956), cert. den. 76 S. Ct. 782 (1956), it was again held that there could be no review of the merits of a System Board decision and that review was limited to questions concerning the jurisdiction of a System Board and to regularity of the proceedings before the board. See also *Byers v. Atchison, Topeka & Santa Fe Ry. Co.*, 129 F. Supp. 109 (D.C. S.D. Cal. 1955).

Similar results have been reached by the courts with regard to review on the merits in instances where an employee has taken a claim to the National Railroad Adjustment Board, received an adverse award, and thereafter sought court review.

In *Berryman v. Pullman Co.*, 48 F. Supp. 542 (D.C. W.D. Mo. 1942), plaintiff brought suit for recovery of wages and for reinstatement as a Pullman conductor after his claim had been denied by the National Railroad Adjustment Board. The court denied review on the merits on the ground that the Adjustment Board award was final and binding and sustained the Pullman Company's motion for summary judgment. To the same effect are *Williams v. Atchison, Topeka & Santa Fe Ry. Co.*, 356 Mo. 967, 204 S.W. (2d) 693 (1947); *Reynolds v. Denver & Rio Grande Western R.R. Co.*, 174 F.2d 673 (CCA 10th 1949); and *Hecox v. Pullman Co.*, 85 F. Supp. 34 (D.C. W.D. Wash. 1949).

The cases cited just above are ones in which plaintiff sought the same relief from the courts as he had previously asked of the National Railroad Adjustment Board. In another established line of cases railroad

employees, after dismissal by their employers, have sought reinstatement before the National Railroad Adjustment Board and, after denial awards, have brought actions for damages for wrongful discharge in the courts. It has been uniformly held that the courts have no jurisdiction over such actions and these holdings amount to a denial of court review of the Adjustment Board's findings on the basis that the Board's determination is final. Among such cases are *Michel v. Louisville & Nashville R.R. Co.*, 188 F.2d 224 (CCA 5th 1954); *Greenwood v. Atchison, Topeka & Santa Fe Ry. Co.*, 129 F. Supp. 105 (D.C. S.D. Cal. 1955); *Coats v. St. Louis-San Francisco Ry. Co.*, 230 F.2d 798 (CCA 5th 1956); *Kelly v. Nashville, Chattanooga & St. L. Ry.*, 75 F. Supp. 737 (D.C. E.D. Tenn. 1948); *Ramsey v. Chesapeake and Ohio R.R. Co.*, 75 F. Supp. 740 (D.C. N.D. Ohio 1948); and *Hicks v. Thompson, et al.*, 207 S.W. (2d) 1000 (Tex. Civ. App. 1948).

All of these cases indicate the clear understanding of the courts that jurisdiction over disputes between railroads and their employees with regard to the interpretation and application of labor agreements is lodged exclusively in the boards provided for in Section 3 of the Railway Labor Act. In only one case, specifically relied on by the Court of Appeals below in support of its holding, has a decision of a System Board established under the Railway Labor Act been reviewed on its merits.

In *Edwards, et al. v. Capital Airline, Inc.*, 176 F.2d 755 (1949) cert. den. 338 U.S. 885 (1949), plaintiffs had received an adverse decision from a System Board of Adjustment and brought suit for a declaratory



judgment and an order enjoining Capital from carrying out the award of the System Board. The union involved had adopted a position in the seniority dispute hostile to the plaintiffs and two union representatives were members of the System Board.

The court in the *Edwards* case held that although the award was entitled to presumptive validity the plaintiffs were entitled to court review on the merits. It was expressly pointed out by the court that the holding was limited to this particular situation.

Not only is the *Edwards* case out of line with the body of cases holding that the courts have no jurisdiction to review the merits of these railroad labor disputes, but there are also certain factors which distinguish the *Edwards* case from the present situation.

It is evident from the opinion in the *Edwards* case that the Court of Appeals for the District of Columbia was doubtful as to its authority to make findings on the merits in the dispute. Its conclusion to determine the merits, rather than simply to void the award of the System Board and return the dispute for further handling under the Railway Labor Act, as was done in the *Brand* case, *supra*, p. 13, was probably influenced by the fact that the dispute involved the seniority rights of veterans returning from military service which, of course, were governed not only by the applicable agreements but also by the veterans reemployment statutes. Secondly, the *Edwards* decision was handed down before the decisions of this Court in *Slocum v. D.L. & W. R.R. Co.*, 339 U.S. 239 (1950), and *Order of Railway Conductors v. Southern Railway Co.*, 339 U.S. 255 (1950). Before these latter decisions were rendered it was believed generally, on



the basis of *Moore v. Illinois Central R.R. Co.*, 312 U.S. 630 (1941), that railroad labor disputes of this character could be taken either to court or to the boards provided for in Section 3 of the Railway Labor Act. In other words, it had not yet been firmly established by this Court that the bipartisan boards provided for in the Railway Labor Act have exclusive jurisdiction to determine the merits of such disputes. Thus the Court of Appeals for the District of Columbia in reaching its conclusions in the *Edwards* case may well have been influenced by a belief that if the decision of the System Board of Adjustment were voided the dispute could be taken to court, and have decided to determine the questions on the merits rather than prolong the dispute by voiding the System Board award without further action.

Since the *Slocum* and *Railway Conductors* cases, however, there can be no question but that these railroad labor disputes are beyond the jurisdiction of the courts except in the enforcement proceedings provided by Section 3, First (p) of the act (Appendix, *infra*, p. 56) with regard to orders of the National Railroad Adjustment Board. The *Berryman* and other cases cited above make it clear that an employee who loses on the merits in a claim against the railroad before the National Railroad Adjustment Board cannot secure court review of the merits of his claim. It has also been established that a railroad against which a claim has been sustained by the National Railroad Adjustment Board, cannot secure court review;

*Washington Terminal Co. v. Boswell*, 124 F.2d 235 (App. D.C. 1941), *aff'd. per curiam* 319 U.S. 732 (1942). Similarly the majority of the cases have denied review on the merits of decisions of System Boards adverse to claimant employees. The only avenue for court review on the merits is in a suit brought to enforce an award of the National Board.

The Court of Appeals below therefore erred in its conclusion that the District Court had jurisdiction to review the merits of the System Board award holding that respondent had failed to comply with the union shop agreement. Even if the Court of Appeals below were correct in its apparent conclusion that presence of B.R.T. representatives on the System Board *per se* rendered the decision in respondent's case invalid, it should have limited its judgment to such a finding, setting aside the Board's award and remanding the dispute for such further handling as might be necessary under the processes of the Railway Labor Act.

II. UNLESS THE COURTS ARE TO BE OPENED TO EXTENSIVE RAILROAD LABOR LITIGATION, CONTRARY TO CONGRESSIONAL INTENT, IT MUST BE PRESUMED THAT SYSTEM BOARDS OF ADJUSTMENT ARE UNBIASED IN DISPUTES ARISING UNDER UNION SHOP AGREEMENTS AS WELL AS IN THOSE ARISING UNDER OTHER COLLECTIVELY BARGAINED AGREEMENTS.

The history of bipartisan boards provided for in Section 3 of the Railway Labor Act, and the cases discussed in the above section of this brief, show an acceptance of this form of handling of labor disputes and show that the decisions of such boards on the merits of a dispute are accorded the finality which Congress intended in order to avoid opening the courts to such disputes. Even in the *Edwards* case,

*supra*, the court assumed that the award of the System Board was presumptively valid. The Court of Appeals below, however, in directing that this case be returned to the District Court for trial on the merits, reversed the trend by holding, in effect, that the System Board award is invalid. The Court below thus went beyond a mere presumption that the decision in respondent's case was invalid. Judge Hand's opinion (R. 39-44) is clearly based on the conclusion that the bipartisan character of the System Board which rendered the decision in itself invalidates the board's action, and requires intervention of the courts to set aside the award and to determine the merits of the dispute.

This question of bias on the part of union members of such boards in the handling of union shop disputes is not raised here for the first time. Cases involving the status of UROC under Section 2, Eleventh (e) of the Railway Labor Act have now been in the courts for several years. *United Railroad Operating Crafts, et al. v. Wyer, et al.*, 205 F.2d 153 (CCA 2d 1953), cert. den. 347 U.S. 929 (1954); *United Railroad Operating Crafts, et al. v. New York, New Haven & Hartford R.R. Co.*, 205 F.2d 153 (CCA 2d 1953); *United Railroad Operating Crafts, et al. v. Northern Pacific Ry. Co., et al.*, 208 F.2d 135 (CCA 9th 1953), cert. den. 347 U.S. 929 (1954); *Johns, Sr. v. Baltimore & Ohio R.R. Co., et al.*, 118 F. Supp. 317 (D.C. N.D. Ill. 1954), aff'd. 347 U.S. 964 (1954); *Alabaugh v. Baltimore & Ohio R.R. Co.*, 222 F.2d 861 (CCA 4th 1955), cert. den. 350 U.S. 831 (1955); *Brock v. Sleeping Car Porters*, 129 F. Supp. 849 (D.C. W.D. La. 1955); *United Railroad Operating Crafts, et al. v.*

*Pennsylvania R.R. Co., et al.*, 212 F.2d 938 (CCA 7th 1954); and *Pigott, et al. v. Detroit, Toledo & Ironton R.R. Co.*, 221 F.2d 736 (CCA 6th 1955), cert. den. 350 U.S. 833 (1955). All of these cases have held that the bipartisan boards established by the Railway Labor Act, the National Railroad Adjustment Board and the system, group or regional boards of adjustment, properly have jurisdiction over disputes arising under union shop agreements. These decisions reflect the presumption, now rejected by the Court of Appeals below, that boards on which the collective bargaining agents are represented may validly determine such disputes.

*United Railroad Operating Crafts, et al. v. Pennsylvania Railroad Co., et al.*, *supra*, involved the union shop agreement between petitioners Pennsylvania and B.R.T. which is here in issue. Plaintiffs in that case brought suit to enjoin the Pennsylvania from proceeding under the union shop agreement to a decision by the System Board of Adjustment, and for a declaratory judgment to the effect that membership in UROC constituted compliance with the union shop agreement on the ground that UROC was a union "national in scope" within the meaning of Section 2, Eleventh (c) of the Railway Labor Act. No question as to jurisdiction was raised in the District Court, which decided the dispute on the merits. 25 L. C. par. 68118 (N.D. Ill. 1953). Certiorari was denied by this Court prior to a ruling by the Court of Appeals for the Seventh Circuit (347 U.S. 929 (1954)). The Court of Appeals for the Seventh Circuit remanded the case to the District Court with instructions to dismiss the case



for lack of jurisdiction. In doing so the Circuit Court noted that the plaintiffs as members of UROC might be at a disadvantage before a board including representatives of the collective bargaining agent. The court, however, by sending the dispute back to the System Board implied that there was no presumption that the members of the board would be prejudiced against the plaintiffs.

Thus the Court of Appeals for the Seventh Circuit, faced with the representation of the collective bargaining agent on the bipartisan board having jurisdiction over a union shop dispute, refused to presume that the decision of the board would be biased. Following this decision disputes involving respondent and other Pennsylvania employees were decided by the System Board, and the Court of Appeals below has now adopted the presumption of bias in the handling of these disputes (in fact a presumption of the invalidity of Board awards) which was rejected by the Court of Appeals for the Seventh Circuit and by the courts in the other cited cases.

If the decision of the Court of Appeals below is sustained and its implications are given full effect, there will necessarily be a similar presumption of invalidity with regard to all decisions of System Boards of Adjustments in union shop disputes. These disputes under union shop agreements arise only when the collective bargaining agent which is a party to the agreement cites an employee for failure to comply with the agreement. There is consequently in every instance a direct conflict between the employee and the collective bargaining agent. The employee claims that he has complied with the union shop agreement



while the collective bargaining agent claims that he has not done so. These disputes may involve simply questions of fact, such as whether an employee has tendered his dues, or whether the tender was timely made, or they may involve more complicated situations, such as the basis on which the union has denied or terminated the employee's membership, or whether, as in respondent's case, the employee has satisfied the union shop agreement by membership in another union and whether such other union is national in scope. The conflict exists in the same degree in all these disputes, once the collective bargaining agent has determined to cite the employee for non-compliance with the union shop agreement. This is an inevitable consequence of the action of Congress in permitting the railroads and the collective bargaining agents to enter into union shop agreements and entrusting the settlement of disputes under the union shop agreements to the administrative boards established under Section 3 of the Railway Labor Act.

In the opinion of the court below there is an indication (R. 44) that court review of this dispute on the merits is necessary because respondent has a right granted by the Railway Labor Act which must be protected, i.e., the right to belong to a union national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees of a craft or class engaged in engine, train, yard or hostling service even if such union is not the collective bargaining representative. The question here presented to the System Board of Adjustment, however, as to whether United Railroad Operating Crafts was national in scope within the meaning of the union

shop agreement,<sup>4</sup> even if it is assumed to be a question involving a right of respondent under the Railway Labor Act,<sup>5</sup> does not differ in substance from any other question raised in a union shop dispute.

Section 2, Eleventh of the Railway Labor Act (Appendix, *infra*, p. 50) effectively prohibits the discharge of an employee for failure to comply with a union shop agreement unless the employee has failed to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. When a railroad employee is cited for non-compliance with the union shop agreement his defense to such a charge must necessarily fall into one of the following categories: (1) proof that the

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<sup>4</sup> No question is raised at any point in the record as to whether United Railroad Operating Crafts is a labor union organized in accordance with the Railway Labor Act and admitting to membership employees in a class or craft of engine, train, yard or hostling service. The issue before the System Board was whether United Railroad Operating Crafts was "national in scope."

<sup>5</sup> There is serious doubt whether Section 2, Eleventh of the Railway Labor Act, which relaxes the general prohibition of the Act against union shop agreements in so far as a specific type of union shop agreement is concerned, can be said to confer any rights upon individual employees. Individual rights conferred on employees by Section 2, Fifth of the Act (45 U.S.C. Sec. 152, Fifth) are restricted by an agreement under Section 2, Eleventh; but so long as the union shop agreement conforms to the requirements of Section 2, Eleventh the application of the union shop agreement does not establish court jurisdiction on the basis of alleged rights granted to individual employees by the Act. See *Hayes, et al. v. Union Pacific R.R. Co.*, 184 F. 2d 337 (CCA 9th 1950) cert. den. 340 U.S. 942 (1951) which held that the courts have no jurisdiction over the application of valid collectively bargained agreements on the basis of allegations that such application violates rights guaranteed to individual employees by the Railway Labor Act.

required payments to the union have been tendered; (2) proof that his membership in the union has been denied or terminated for some reason other than failure to tender the required payments to the union; or (3) if he is an employee in engine, train, yard or hostling service, proof that he is a member in some other labor organization, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service. If the employee can prove that his case falls within any of the foregoing categories he has shown that he is in compliance with the union shop agreements permitted by the Railway Labor Act. Each such defense to a charge of non-compliance with a union shop agreement stands on an equal footing. The defense raised in respondent's case, where he contended that the union which he joined was national in scope, was no more valuable to him than the defense of payment of dues may be to some other employee who is cited for non-compliance with a union shop agreement.

In other words, it follows from the opinion of The Court of Appeals below that in every union shop dispute which is decided by a System Board, with representation of the collective bargaining agent on the board, the decision of the System Board is invalid and the courts, therefore, have jurisdiction to review each and every one of such disputes on the merits.

Furthermore, it is difficult to see how such a principle, if sound, can be confined to the disputes under union shop agreements. There are and have been over the years many disputes, arising under collectively bargained agreements and consequently

within the jurisdiction of the boards provided for in Section 3 of the Railway Labor Act, in which the collective bargaining agent necessarily adopts a position opposed to the claims of employees affected by the dispute.

The *Edwards* case discussed *supra*, p. 18, is an example of a type of dispute which frequently arises between a railroad and its employees. The *Edwards* case involved a protest by one group of employees with regard to seniority rights which the employer had accorded to another group of employees. In such a situation, which is common in the railroad industry where job retention and job selection are almost entirely based on seniority rights, the collective bargaining agent must side with one claimant or group of claimants against the other. Such disputes are clearly within the jurisdiction of System Boards of Adjustment and have been subject to the same finality of decision as any other types of disputes between railroads and their employees.

It should be realized that if these boards are to function in the manner intended by Congress to settle and adjust these minor disputes between railroads and their workers, there must be such a degree of reasonableness and flexibility in the consideration of disputes by these boards that decisions can be reached. If an employee's claim taken to a System Board is denied because a representative of the collective bargaining agent agrees with the railroad members of the board that the claim should not be sustained, it would be possible for the employee making the claim to contend that this showed bias against him on the part of the collective bargaining agent. Yet such a claim of



bias, if the implications of the decision below are made effective, would give the courts jurisdiction to review the merits of even the simplest form of pay claim made by an employee under a collectively bargained agreement.

That such a conclusion is not far-fetched appears from the fact that the court below expressly accepted and adopted as a precedent the decision in the *Edwards* case (R. 43), which held that the court had jurisdiction to review the merits of a board decision in one of the commonest types of disputes under collectively bargained agreements. It is apparent, therefore, that if bias is to be presumed from the presence of representatives of a collective bargaining agent on a System Board of Adjustment in disputes where conflict exists or may be alleged to exist between the employee before the board and the agent, and if this presumption of bias permits the courts to review the merits of the decisions made by System Boards of Adjustment, the courts will be open wide to a flood of cases, not only under union shop agreements but under the ordinary collectively bargained agreements which regulate the day to day working conditions of railroad employees, and will be called upon to render those interpretations of railroad collectively bargained agreements, affecting future conduct of the parties under the agreements, that this Court held in the *Slocum* and *Railway Conductors* cases, *supra*, p. 19, to be within the exclusive jurisdiction of the administrative boards provided by the Railway Labor Act.

It is submitted that an interpretation of the Railway Labor Act bringing about such a result is unnecessary.



The presumption, of the validity of decisions of System Boards of Adjustments which has existed since the first provision for such boards in the Railway Labor Act of 1926 should be retained. The rights of the employees whose disputes come before such boards are adequately protected by limiting court review to questions of proper procedure, to whether the board confined itself to the scope of the submission of the parties, and to whether the decision was arrived at by fraud and corruption, as held in the *Brand* and other cases cited *supra*, at pp. 13-17.

It should be noted that the District Court below recognized that upon proper allegations of bias, or fraud or corruption, it would have the right to review the decision of the System Board in respondent's case, but held that no such issues were properly raised by the complaint (R. 29-30). Even if the Court of Appeals below were correct in concluding that the District Court's holding was wrong, the Court of Appeals should have returned the case, not for trial on the merits, but for a determination of the question of bias. If bias were established and held to invalidate the Award, the District Court could properly only vacate or stay the award pending further handling by the parties under the processes of the Railway Labor Act.

### III. COURT REVIEW OF THE MERITS OF A DECISION OF A SYSTEM BOARD OF ADJUSTMENT, IN THE ABSENCE OF STATUTORY AUTHORITY THEREFOR, RUNS COUNTER TO THE WHOLE SCHEME OF THE RAILWAY LABOR ACT.

As stated above, the *Slocum* and *Railway Conductors* cases, *supra*, p. 19, decided in 1950, resulted in a clear ruling by this Court that the jurisdiction of the

National Railroad Adjustment Board and other boards provided for in Section 3 of the Railway Labor Act is exclusive with regard to the minor disputes between railroads and their employees.

These decisions were the logical sequel to earlier holdings by this court interpreting the Railway Labor Act and affirming the intent of Congress to have railroad labor disputes settled by the machinery of the Railway Labor Act rather than in the courts.

In 1943 this court handed down decisions in three important cases under the Railway Labor Act: *Switchmen's Union of North America, et al. v. National Mediation Board*, 320 U.S. 297, *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company, et al.*, 320 U.S. 323, and *General Committee of Adjustment of the Brotherhood of Locomotive Engineers, et al. v. Southern Pacific Company, et al.*, 320 U.S. 338.

In the *Switchmen's Union* case the National Mediation Board, in accordance with Section 2, Ninth of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185), certified the Brotherhood of Railway Trainmen as representative of yardmen on the New York Central. The Switchmen's Union attempted to have this certification set aside. This Court held that no judicial review of the determination of the National Mediation Board was available.

This Court pointed out that Congress created in Section 2, Fourth of the Act the right of a majority of any craft or class of employees to determine their representative for the purpose of the Act and pro-

tested this right by Section 2, Ninth giving the Mediation Board power to settle controversies as to representation. This Court stated that review by the Federal District Courts of a determination by the National Mediation Board was not necessary to protect the rights created by Congress, since Congress in establishing the right had itself provided the method for its protection and it was for Congress to determine how the rights created by it should be protected and enforced.

The Court pointed out that Congress had provided for judicial review of administrative orders or determinations under the Act only in two situations, in suits to enforce Adjustment Board awards under Section 3, First (p), and in actions to enforce arbitration awards under Section 9. The Court concluded that since Congress had not provided expressly in the Railway Labor Act for review of these determinations by the National Mediation Board there was no right under the Act to such court review.

In the *Missouri-Kansas-Texas* case, *supra*, there was a jurisdictional dispute between two railroad labor unions with regard to their right to represent certain employees in collective bargaining. These unions, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, because of a continual movement of employees between the classes of engineers and firemen, had for many years been in agreement as to the rights of the respective brotherhoods to represent their members and as to the conditions under which engineers would be demoted to firemen and firemen promoted to engineers' work. An agreement providing a different

manner of handling these employees was entered into between the railroad and the firemen's brotherhood, and suit was brought by the Brotherhood of Locomotive Engineers on the ground that the agreement violated the Railway Labor Act.

The Court discussed the history of the Railway Labor Act and concluded that Congress left many of the problems which might arise under the Act to the voluntary processes of conciliation, mediation and arbitration while conferring jurisdiction on the courts and on administrative boards only over certain of the problems and disputes which might arise under the Act. The Court said there was a strong inference that Congress intended to go no further in the use of the processes of adjudication and litigation than was indicated by the express provisions of the Act.

The Court found that Congress had made no provision for the settlement of jurisdictional controversies between unions representing crafts with overlapping interests and that consequently the questions raised in this action were not justiciable. The Court said that a decision on the merits with regard to the jurisdictional controversy would involve the granting of judicial remedies which Congress did not intend to be available to the parties.

The *Southern Pacific* case, *supra*, decided on the same day, involved a similar controversy between the same brotherhoods. This Court again held that under the scheme of the Railway Labor Act Congress did not intend jurisdictional controversies between unions to be settled in the courts.

These decisions foreshadowed the ultimate conclusion that the remedies for minor disputes with



regard to collective bargaining agreements were to be found only under the Act and not in the courts, since Congress had provided administrative boards in Section 3 of the Act for the handling of such disputes. A long step in this direction was taken by this court in *Order of Railway Conductors, et al. v. Pitney, et al.*, 326 U.S. 561 (1946). In that case the railroad was faced with a dispute as to whether road conductors represented by the Order of Railway Conductors or yard conductors represented by B.R.T. should be used to man certain trains. An action involving the dispute was brought in the United States District Court which had charge of reorganization of the railroad involved. The suit asked the court to order the trustees of the railroad to continue to use road conductors on the trains.

The District Court dismissed the petition on the merits. When the case reached this Court it was held that since Congress in the Railway Labor Act intended to place a minimum responsibility on the courts with regard to railroad labor matters, the reorganization court should have exercised its equitable discretion to give the National Railroad Adjustment Board the first opportunity to pass on the merits of the dispute. This court sustained the action of the District Court in instructing the trustees in charge of the railroad on the basis of its findings on the merits but held that dismissal of the suit should be stayed by the District Court in order to give an opportunity for the dispute to be determined by the National Railroad Adjustment Board.

Thus in pursuance of its established interpretation of the Railway Labor Act as limiting the jurisdiction



of the courts to those matters which Congress clearly intended to be subject to judicial remedies; this Court took a further step to its ultimate conclusion that the National Railroad Adjustment Board and boards of adjustment have exclusive jurisdiction over these minor labor disputes, a conclusion which is based primarily on the theory of the Railway Labor Act that Congress provided a comprehensive scheme covering all phases of railroad labor relations, some of which are intended to be handled only through mediation, conciliation and arbitration, some of which are to be handled only by administrative action, and only a few of which, by express Congressional provision, are subject to judicial remedies.

It is true that this Court has held that the courts may act with regard to certain problems under the Railway Labor Act for which no express judicial remedies have been provided by the Act. In *Order of Railway Conductors of America, et al. v. Swan, et al.*, 329 U.S. 520 (1947), there was a stalemate involving the National Railroad Adjustment Board because of failure of the members of that board to agree on whether disputes involving yardmasters should be handled by the First Division or the Fourth Division. This Court decided that question in order to prevent what was termed as at page 524 "jurisdictional frustration on an administrative level" which prevented the yardmasters from pursuing their remedies before the National Railroad Adjustment Board. The Court held that although normally the question of jurisdiction should be determined by the administrative agency, the hopeless division among the members of the Adjustment Board in this case justified judicial guidance.

Likewise, this Court has held that there is a judicial remedy where the validity of a collectively bargained agreement is attacked, as distinguished from the case in which the interpretation or application of such an agreement is challenged. *Steele v. L. & N. R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 325 U.S. 210 (1944); and *Brotherhood of Railroad Trainmen, et al. v. Howard, et al.*, 343 U.S. 768 (1952). In each of these cases railroad employees brought suit attacking the validity of an agreement on the basis that it was unlawful under the Railway Labor Act and this Court held that disputes of this character did not fall within the jurisdiction of the National Railroad Adjustment Board.

The present case, however, bears no relationship to those cases where the jurisdiction of the courts has been sustained. No material question as to the validity of the union shop agreement under which respondent was discharged or the jurisdiction of the System Board of Adjustment to hear and decide disputes arising under the agreement is in question before this Court. No unlawful discrimination by the collective bargaining agent is involved in this case since the dispute involves a union shop agreement, sanctioned by Congress, which makes lawful the efforts of the collective bargaining agent to enforce its terms.

The whole history of interpretation of the Railway Labor Act in this Court denies the validity of the conclusion reached by the Court of Appeals below, that in the absence of express statutory authority the courts have jurisdiction to review on the merits the decisions of the bipartisan administrative boards

provided for by Congress in Section 3 of the Railway Labor Act.

IV. THE RAILWAY LABOR ACT PROVIDES AN ADMINISTRATIVE PROCEDURE FOR DETERMINING THE ISSUE OF WHETHER A LABOR UNION IS NATIONAL IN SCOPE FOR THE PURPOSES OF THE ACT, AND THIS ISSUE IS THEREFORE NOT SUBJECT TO DETERMINATION BY THE COURTS.

The sections of the brief above are concerned primarily with the question of the jurisdiction of the courts to review on the merits a decision of the System Board of Adjustment in a railroad labor dispute within that board's jurisdiction. The particular issue in respondent's case before the System Board of Adjustment, however, whether United Railroad Operating Crafts is "national in scope" within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, is one which Congress has entrusted specifically to determination by an administrative board under Section 3, First (f) of the Railway Labor Act.

Section 3, First (a) of the Railway Labor Act (Appendix, *infra*, p. 51) provides that one-half of the members of the National Railroad Adjustment Board shall be selected by "such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act."

Section 3, First (f) (Appendix, *infra*, p. 52) provides that if there is a dispute as to the right of any national labor organization to participate in the selection of members of the Adjustment Board, i.e., if there is a dispute as to the qualifications of a labor

organization as set forth in Section 3, First (a), the Secretary of Labor is to investigate the claim of the organization and if in his judgment the claim has merit, is to notify the National Mediation Board which thereafter shall establish a three-man board to decide the qualifications of the labor organization.

Contrary to the holding of the Court of Appeals below (R. 42-43) the board established under Section 3, First (f), in determining whether a labor organization is qualified to participate in selecting Adjustment Board members, is authorized to pass only on the questions raised by Section 3, First (a), namely, whether the organization is national in scope and whether it has been organized in accordance with the provisions of the Railway Labor Act.

These same qualifications, that a labor organization be national in scope and organized in accordance with the Railway Labor Act, must be established under Section 2, Eleventh (c) of the Act (Appendix, *infra*, p. 51) if membership in the labor organization is to constitute compliance with a union shop agreement between a railroad and another labor organization.

Section 2, Eleventh (c) provides that a union shop agreement shall permit a railroad employee in engine, train, yard or hostling service to comply with the agreement through membership in a labor organization, national in scope, organized in accordance with the Act, and admitting to membership employees of a craft or class in engine, train, yard or hostling service. These qualifications necessary under Section 2, Eleventh (c) are identical with those provided in Section 3, First (a) of the Act for labor organizations participating in selection of National Railroad Ad-

justment Board members. It is submitted, therefore, that Congress in adopting Section 2, Eleventh (c) intended that any dispute thereunder as to whether a union is national in scope or organized in accordance with the Railway Labor Act be determined by the administrative process specifically established in Section 3, First (f) of the Act.

Section 2, Eleventh (c) of the Railway Labor Act has a very brief legislative history which does not throw any express light on the intention of Congress with regard to the determination of disputes such as that raised by respondent with regard to the status of United Railroad Operating Crafts. This subsection of the union shop amendment resulted from a practical situation, possibly unique to the railroad industry, where employees of various classes are subject to frequent moves from one class to another in their day-to-day employment. On the railroads engineers are drawn from the ranks of firemen and when their seniority as engineers does not entitle them to work in that class they return to positions as firemen; a similar situation exists with regard to conductors and trainmen. The result is that a member of one of these so-called "operating" classes of employees may work intermittingly in two classes represented by different collective bargaining agents and might therefore have been required to comply with more than one union shop agreement if some special provision had not been made in Section 2, Eleventh of the Act.

The original union shop bill (S. 3295, 81st Congress) contained no provision with regard to this situation among the operating classes nor was any reference to the problem contained in the report of the Senate



Committee on the bill (S.R. 2262, 81st Congress, 2nd Session).

However, on September 23, 1950, Senator Hill of Alabama offered the following amendment on the floor:

“Provided, further, that no such agreement shall require membership in more than one labor organization.” (96 Cong. Rec. 15735, 81st Cong. 2nd Session)

In offering the amendment Senator Hill discussed the situation among the operating classes and stated that the purpose of his amendment was to assure that an employee not be deprived of employment because of lack of membership in the union representing the craft or class in which he is located if he maintains his membership in the union representing the class or craft from which he has been transferred.

Thereafter on December 7, 1950, Senator Hill offered on the floor a new amendment identical with the present provisions of Section 2, Eleventh (c) of the Railway Labor Act (96 Cong. Rec. 16260, 81st Cong. 2nd Session). Senator Hill pointed out that the language of the new amendment had the same intention and purpose as the prior amendment but the new amendment, spelling out in detail the purposes of the former amendment, had been agreed to by all the railroad labor organizations.

Despite the lack of legislative history, it must be presumed from the scheme and intent of the Railway Labor Act that Congress intended disputes arising as to the status of the labor organizations under Section 2, Eleventh (c) to be decided by the administrative

machinery of the Railway Labor Act rather than by the courts. There is no question but that a railroad labor union admitting to membership employees in the engine, train, yard and hostling services can secure through the processes provided by Section 3, First (f) of the Act a final and binding determination as to its status under union shop agreements. Under these circumstances it is clear that Congress intended the courts not to exercise jurisdiction to render decisions on the status of the labor organizations, particularly where, as will be discussed more fully below, the result might be differing determinations resulting in confusion in the application of such agreements on the different railroads.

In the opinion of the Court of Appeals below (R. 43) it is asserted that the administrative remedy provided by Section 3, First (f) of the Act is not an adequate remedy for an individual employee who asserts that the union he has joined is national in scope. However, an individual employee, like respondent, acts at his peril when with knowledge of the provisions of the union shop agreement and of the Railway Labor Act he terminates membership in the union which is his collective bargaining agent and joins another union. If the other union is not already recognized and established as a union national in scope and otherwise qualified under Section 2, Eleventh (c) of the Act the employee, even if he believes in good faith that the other union is national in scope, has placed himself beyond the protection of the union shop agreement and the Railway Labor Act.

Presumably respondent was told by representatives of UROC that membership in that labor organiza-

tion would mean compliance with the union shop agreement. It does not follow that respondent having acted on the basis of such a representation is entitled to a court determination of the status of his new labor organization.

Let us assume that instead of informing employees that a labor organization carrying on an organizing campaign is national in scope, the organizers tell the employees that the union shop agreement which covers them is invalid because the union which is a party to that agreement is not properly the collective bargaining agent of the employees. If the employees were persuaded by this argument and failed to comply with the union shop agreement it is clear that they could not thereafter have a court determination as to the propriety of the certification of the collective bargaining agent and the validity of the union shop agreement, since the determination of collective bargaining representatives for the purposes of the Railway Labor Act is exclusively within the jurisdiction of the National Mediation Board. *Switchmen's Union of North America, et al. v. National Mediation Board, supra*, p. 31. The only method of attacking the right of a labor organization to represent a class of employees for collective bargaining and to enter into a union shop agreement is through the administrative procedure provided by Section 2, Ninth of the Railway Labor Act, by request to the National Mediation Board from one or the other contending labor organizations. This again is not a remedy which is available to an individual employee as a defense against alleged non-compliance with a union shop agreement.

The opinion of the court below recognizes that the decision of the Court of Appeals for the Sixth Circuit in *Pigott v. Detroit, T. & I. R.R. Co.*, *supra*, p. 23, is in direct conflict with the holding of the court below in this case. It is submitted that the decision in the *Pigott* case should have been extended by the court below to a holding that Section 3, First (f) of the Railway Labor Act not only provides an adequate administrative remedy for members of a labor organization whose status under the Act is in question but also provides an exclusive remedy for that labor organization on behalf of its members.

In the *Pigott* case plaintiffs were again members of the United Railroad Operating Crafts who brought suit to restrain the railroad from discharging them for failure to comply with a union shop agreement with the Brotherhood of Railroad Trainmen. Before the complaint was filed the disputes were presented to a System Board of Adjustment consisting of a representative of the railroad and a representative of the brotherhood, and this System Board held that the plaintiffs had failed to comply with the union shop agreement.

Among the contentions made before the Court of Appeals was the contention which was sustained by Judge Hand in his opinion in the court below, namely, that there was a presumption of bias on the part of the union representative on the System Board of Adjustment which rendered the award of the System Board of Adjustment invalid and required court review of the merits of the dispute.

The Court of Appeals for the Sixth Circuit discussed at length the procedure provided by Section 3,



First (f) of the Act for determining the qualifications established by Section 3, First (a) of the Act for a labor union which is to participate in designating members of the National Railroad Adjustment Board and concluded that this administrative procedure was an available and adequate remedy. The court pointed out that proceedings under Section 3, First (f) would be conclusive and would have a prospective universal application for the purposes of the Railway Labor Act. The court held that by adopting in Section 2, Eleventh (c) the same qualifications for a labor organization as are required by Section 3, First (a), Congress intended that before a labor organization should be in a position to protect its members working in classes represented by other collective bargaining agents the labor organization should have established its qualifications to participate in the administrative machinery of the National Railroad Adjustment Board. The court held that plaintiffs acted at their own peril in failing to insist that UROC establish its status under the administrative machinery provided by the Railway Labor Act for that purpose and in failing, pending such a determination, to maintain their membership in the union which was their collective bargaining agent.

The opinion of the court below, as has been indicated above, flatly differs with the holding in the *Pigott* case on the two grounds which have already been discussed, namely, that a proceeding to determine a labor organization's qualifications under Section 3, First (a) will not determine its qualifications under Section 2, Eleventh (c) and that the procedure of Section 3, First (f) is not available to the respondent and other individual employees. It is submitted that on the



contrary it is apparent from the provisions of the Act, as properly held in the *Pigott* case, that a decision made under the administrative machinery of Section 3, First (f) will be a final and binding determination of the status of a labor organization under Section 2, Eleventh (c). It is further submitted that the whole scheme of the legislative intent of the Railway Labor Act indicates that Congress did not intend individual employees to raise in the courts questions as to the status of labor organizations under the Railway Labor Act, whether for the purpose of Section 2, Eleventh (c) of the Act or for the purpose of determining the collective bargaining representative or for any other purpose under the Act.

Finally, there are urgent practical reasons for holding that the procedures established by Congress under Section 3, First (f) of the Act are applicable to questions as to union status arising under Section 2, Eleventh (c) and were intended by Congress so to apply to the exclusion of the courts and other administrative remedies. If the question of whether a labor organization is national in scope is to be determined in each dispute on each railroad on an *ad hoc* basis there will be no end to disputes before the administrative boards and the courts. A court may ultimately determine that UROC was or was not national in scope in February, 1953, when respondent left the B.R.T., but what about an employee who joined UROC a year or six months or a month later? The issue on the subsequent date may be a new one, because of changes in membership, changes in representation of employees by UROC and other factors which vary from day to day in all labor organizations, and the

union which is a party to the union shop agreement may raise the question at any time.

This situation not only means continuous and prolonged litigation but it also imperils the employees subject to the union shop agreements. If a labor organization is held by the courts to be national in scope on a given date, that fact cannot assure an employee that a similar holding will follow if he joins the organization on a subsequent date and is cited for non-compliance with a union shop agreement. There will be no certainty in the application of the agreement to guide the conduct of the employees.

On the contrary, however, if a labor organization goes through the procedure of Section 3, First (f), and is held to be qualified to participate in naming the employee representatives of the National Railroad Adjustment Board, and thus national in scope and organized in accordance with the Act for the purposes both of Section 2, Eleventh (c) and Section 3, First (a), the situation with regard to that labor organization will become stabilized. The status of the organization will remain fixed unless and until, in a subsequent proceeding under Section 3, First (f), there is an administrative determination that the labor organization is no longer qualified. Similarly, if a labor organization has not qualified under Section 3, First (a) or has been held not qualified as the result of a board decision under Section 3, First (f), that status will remain fixed until it may be changed following new proceedings under the administrative process of Section 3, First (f). In any dispute under a union shop agreement, in which the cited employee pleads membership in a union national in scope and organ-

ized in accordance with the Railway Labor Act, the administrative board passing on the dispute need only look to determine whether the organization has been qualified on the date in question under the Section 3, First procedure. This is a matter of fact for precise determination, not only by the administrative boards but also by employees subject to the union shop agreements who are considering transfer from one union to another.

It is submitted that by holding the procedure of Section 3, First (f) to be applicable to these determinations of union status under Section 2, Eleventh (c) the pattern of judicial construction of the Railway Labor Act in the light of Congressional intent will be preserved.

#### CONCLUSION

Petitioner submits that in the above argument it has shown:

- (1) The history of the Railway Labor Act and the decisions of the courts under the Act establish the finality of the decisions of bipartisan boards in railroad labor disputes and establish that the courts have jurisdiction to review the merits of such disputes only in the manner specifically provided in the Railway Labor Act for such a review.
- (2) If there is to be a presumption with regard to the awards of the boards established by Congress to handle these labor disputes it is a presumption that the awards are valid and binding. Review of these awards must properly be limited to questions of procedure, whether the

awards conform to the submissions made and whether there was any actual fraud or corruption in arriving at the award. Under no circumstances should the courts undertake to review the merits of the awards but should leave the actual interpretation and application of the collectively bargained agreements, including union shop agreements, to the administrative machinery provided by the Railway Labor Act.

- (3) Congress has provided in the Railway Labor Act an express administrative procedure for the determination of the issue raised by respondent. The holding of the court below that this issue is to be determined judicially is in direct conflict with the past interpretation of the Railway Labor Act to the effect that Congress drastically limited the judicial power with regard to disputes under the Act. The presence of this administrative machinery divests the courts of jurisdiction to determine this issue.
- (4) The fact that the administrative machinery is available only to the labor organization to which respondent belongs does not give jurisdiction to the courts to determine the status of the labor organization any more than in a case where an individual employee may attack the right of his collective bargaining agent to act as such, a matter within the exclusive jurisdiction of the National Mediation Board and again a matter in which the individual has no judicial remedy. Furthermore, only by application of this administrative machinery can the issue of union status be handled in a manner which will avoid

confusion and uncertainty in the application of union shop agreements and which will afford protection to the operating employees who may transfer from one union to another.

Petitioner therefore respectfully requests this court to reverse the judgment of the Court of Appeals below and to affirm the judgment of the United States District Court for the Western District of New York dismissing respondent's complaint for failure to state a cause of action.

Respectfully submitted,

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## APPENDIX

## RELEVANT STATUTORY PROVISIONS

*SECTIONS 2 AND 3 OF TITLE I OF THE RAILWAY LABOR ACT, AS AMENDED (48 STAT. 1186, 1189, 64 STAT. 1238; 45 U.S.C. §§ 152, 153) PROVIDE IN PART AS FOLLOWS:*

## SECTION 2. \* \* \*

“Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

“(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deduction from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him; Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

“SEC. 3. First. There is hereby established a Board, to be known as the ‘National Railroad Adjustment Board’, the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

“(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

“(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall elect the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

“(c) The national labor organization as defined in paragraph (a) of this section, acting through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

“(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

“(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

“(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary

shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the  $\frac{1}{2}$  selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is likewise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

“(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

“First division: To have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

“Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house



employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train-dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when prop-



erly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

“(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as ‘referee’, to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board should be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

“(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the representative parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

“(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

“(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q). All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, form mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

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IN THE  
**Supreme Court of the United States**

October Term, 1956

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No. 56

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PENNSYLVANIA RAILROAD COMPANY and BROTHERHOOD  
OF RAILROAD TRAINMEN, *Petitioners*,

v.

N. P. RYCHI *x*, individually and on behalf of and as  
representative of other employees of the Penn-  
sylvania Railroad, *Respondent*.

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On Writ of Certiorari to the United States Court of Appeals  
for the Second Circuit

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**BRIEF FOR PETITIONER BROTHERHOOD OF  
RAILROAD TRAINMEN**

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**OPINIONS BELOW**

The opinion of the United States District Court for the Western District of New York (R. 22-34) is reported at 128 F. Supp. 449. The opinion of the United States Court of Appeals for the Second Circuit (R. 39-44) is reported at 229 F. 2d 171.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on January 9, 1956 (R. 44). On April 4, 1956, a joint petition for certiorari was filed by the Brotherhood of Railroad Trainmen and the Pennsylvania Railroad Co. Certiorari was granted by this Court on May 14, 1956. 351 U.S. 930. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## **QUESTIONS PRESENTED**

1. Does a District Court of the United States have jurisdiction to review the merits of a decision of a System Board of Adjustment, established under Section 3, Second of the Railway Labor Act, in a dispute arising under a union shop agreement solely because representatives of the labor organization representing employees of the carrier are members of such System Board and participate in such decision?

2. Does a District Court of the United States have jurisdiction to review the merits of the decision of a System Board of Adjustment that a labor organization is "national in scope" within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, where Section 3, First (f) of the Railway Labor Act provides an available administrative procedure for final determination of such question, and where such labor organization has failed to follow such available administrative procedure for final determination of its status?

## **STATUTES INVOLVED**

This case involves Section 2, Eleventh of the Railway Labor Act, as amended (45 U.S.C. § 152, Eleventh; 64 Stat. 1238), which permits railroads and the labor

organizations representing their employees to make union shop agreements. It also involves Section 3 of the Act (45 U.S.C. § 153; 48 Stat. 1189), which provides for the establishment of the National Railroad Adjustment Board, or in lieu thereof, of system, group or regional boards of adjustment, for the purpose of adjusting and deciding disputes between the railroads and their employees. These pertinent portions of the Act are set forth in the Appendix hereto, p. 36, *infra*.

### STATEMENT

On January 28, 1955, respondent filed a complaint in the United States District Court for the Western District of New York against the petitioner Pennsylvania Railroad Co. and the petitioner-intervenor Brotherhood of Railroad Trainmen. Attached to the complaint were an affidavit by respondent's counsel and certain exhibits.

It was alleged that on March 26, 1952, the Pennsylvania and its employees represented by the Brotherhood entered into a union shop agreement, as permitted by Section 2, Eleventh of the Railway Labor Act (R. 7). This agreement provided that, as a condition of their continued employment, these employees must become members of the Brotherhood and maintain membership in good standing, except under specified circumstances (R. 12-13). The agreement also provided that the requirement of Brotherhood membership was not applicable to employees "who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act" (R. 13).

Having been a member of the Brotherhood in good standing, respondent resigned his membership in Feb-

ruary, 1953, and became a member of the United Railroad Operating Crafts (UROC), which he believed in good faith to be a railroad union national in scope (Affidavit, par. 3, R. 10). Respondent, together with other similarly situated employees, was then cited for non-compliance with the union shop agreement (Affidavit, par. 4, R. 10). He was given a hearing under the agreement before the System Board of Adjustment on or about August 27, 1953, but decision was postponed (Affidavit, par. 4, R. 10-11). Respondent joined the Switchmen's Union of North America, a union recognized to be national in scope, on July 31, 1954, and has been a member in good standing since that date (R. 5, 11). Evidence of that membership was presented at a further hearing before the System Board on August 23, 1954 (Affidavit, par. 5, R. 11).

The affidavit of counsel further alleged that on January 3, 1955, respondent received a letter from the System Board notifying him of the Board's decision that he had not complied with the union shop agreement and that membership in UROC does not constitute compliance with the agreement (Affidavit, par. 7, R. 11, 17). He received this letter "in spite of the fact that there had been no conclusive determination of the status of the said UROC, and despite the fact that administrative proceedings have been instituted by the said UROC to have itself recognized as national in scope" (Affidavit, par. 7, R. 11). On or about January 14, 1955, he was notified by the Pennsylvania that he was "out of service" (Affidavit, par. 8, R. 11), a notice that was later confirmed by letter (Affidavit, par. 10, R. 12). Unnamed fellow employees of respondent also received such notification of their discharge (Affidavit, par. 11, R. 12).

It was also alleged in the complaint that after respondent and his unnamed fellow employees had allowed their membership in the Brotherhood to lapse in 1953, they applied for reinstatement. This application was denied by the Brotherhood even though a tender of membership dues had been made. (R. 4, 6-7).

The complaint asked the District Court to restrain the Brotherhood and the Pennsylvania from continuing the discharge or suspension of respondent and his unnamed fellow employees until they have been given an opportunity for reinstatement or membership in the Brotherhood under the same terms or conditions available to other members (R. 8-9), and from enforcing the union shop to terminate their employment (R. 9). It was alleged that their discharge, following the Brotherhood's refusal to reinstate them, was contrary to Section 2, Eleventh (a) of the Railway Labor Act (R. 4-5). And since respondent was a member in good standing of the Switchmen's Union since July 31, 1954, his discharge was said to violate Section 2, Eleventh (c) of the Act (R. 5).

The complaint also charged that the union shop agreement was invalid under the Railway Labor Act in that (1) under the Act a System Board of Adjustment does not have jurisdiction over union shop disputes, (2) the Act and general principles of law are violated when the collective bargaining agent, the Brotherhood, is represented on the System Board, and (3) the provisions of the union shop agreement purporting to make the System Board's decisions final and binding are contrary to the Act (R. 7-8). The Brotherhood, in its representation on the Board, was said to be the "accuser, judge, and jury, in respect to the employees' right to work, all of which is in direct



conflict with settled principles of American jurisprudence" (R. 8).

The District Court, on petitioners' motion, dismissed the complaint for failure to state a cause of action (R. 34-36). In its opinion (R. 22-34; 128 F. Supp. 449), the court noted that the complaint was silent as to respondent's membership in UROC and as to the proceedings before the System Board and that no request had been made to review such proceedings. Such a review, even when requested, was held not to extend to the merits of the decision but only to the Board's procedure, the scope of the decision, and factors of fraud or corruption—all matters untouched by the complaint (R. 29). The court further held that the union shop agreement was valid and that representation of the collective bargaining agent on the System Board did not per se make the agreement invalid (R. 30). It was noted that the complaint contained no allegation of discrimination by a Board member.

The District Court further held that under the Act and the union shop agreement continued membership in a qualified union is a condition of continued employment. The Brotherhood's denial of reinstatement to respondent was held not to be a ground for judicial intervention (R. 31) and respondent's belated affiliation with the Switchmen's Union did not excuse his prior failure to maintain membership in a qualified union (R. 31-32).

Finally, the District Court held that the pleadings (including the affidavit and exhibits) made it unnecessary to determine the status of UROC and whether membership therein constituted compliance with the

union shop agreement. It was noted that determination of whether UROC was a union "national in scope" was left to specific administrative procedure under the Railway Labor Act (R. 33).

The Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case for trial on the merits. R. 39; 229 F. 2d 171. The Court of Appeals disregarded the District Court's holding that the complaint, considered by itself, made no reference to respondent's membership in UROC and contained no request for review of the System Board of Adjustment, thus stating no cause of action. The appellate court, apparently accepting all the additional facts set forth in the affidavit and exhibits accompanying the complaint, held that the System Board of Adjustment had jurisdiction over the matter under Section 3, First (i) of the Act as a dispute growing out of the interpretation or application of agreements concerning working conditions. But it held that the representation of the Brotherhood on the System Board made that Board's determination suspect because of the Brotherhood's presumptive bias against UROC, a competing union whose status as an organization "national in scope" was at issue. And it felt that this supposed bias was not remedied by a proceeding under Section 3, First (f) whereby a three-man board—composed of a representative of qualified unions, a representative of the union claiming to be "national in scope", and a third member chosen by the National Mediation Board—decides whether the applicant union is "national in scope" and hence is entitled to be an elector of unions representing employees in panels of the National Adjustment Board. Thus the District Court was held to have jurisdiction

to review the merits of the System Board's determination.

### **SUMMARY OF ARGUMENT**

The court below erred in holding that the merits of a determination of the System Board of Adjustment could be judicially reviewed merely because of a supposed but unproved bias against the respondent by the Brotherhood members of the System Board on the issue of whether membership in a competing union constituted compliance with the union shop agreement. Such a ruling is at war with the whole pattern of the Railway Labor Act, wherein exclusive jurisdiction has been granted to administrative boards created under that Act to adjust disputes such as was involved here. The representation of union members on these administrative boards has long been a hallmark of the Act. Congress had sufficient faith in the honesty, integrity and objectivity of union representatives called to serve on these boards to sanction their inclusion and to fortify their decisions with a final and binding effect. Courts should not lightly overturn the trust that Congress has thus exhibited and permit judicial review on a mere presumption of bias, especially where bias is neither alleged nor proved.

The provisions of Section 3, First (f) of the Act afford an independent and exclusive administrative procedure for determining whether a union is national in scope. The System Board had no jurisdiction to decide that issue, thus eliminating any possibility of exhibiting "presumptive bias" against the respondent on this issue. While Section 2, Eleventh (e), the union shop provision, does not specifically refer to the procedure set forth in Section 3, First (f) for deter-

mining when a union is "national in scope", the identity of the standards involved in the two sections and various practical considerations dictate a meshing of these provisions.

Judicial review in this case would mean confusion and chaos on the issue of when a union is "national in scope" for purposes of the union shop requirement. A proper respect for the principles of the Act and a careful reading of the statutory provisions make plain an available, workable remedy within the framework of the Act that obviates the necessity of judicial review.

### **ARGUMENT**

#### **I. THE FACT THAT BROTHERHOOD REPRESENTATIVES CONSTITUTED HALF OF THE SYSTEM BOARD DID NOT DISQUALIFY THE SYSTEM BOARD OR RENDER ITS DETERMINATION SUBJECT TO JUDICIAL REVIEW.**

The Court of Appeals below held that the System Board of Adjustment involved in this case was disqualified to render its determination that respondent's "membership in the United Railroad Operating Crafts does not constitute compliance with the Union Shop Agreement." R. 17-18. This disqualification was said to stem from the fact that two of the four members of the System Board were Brotherhood members. In holding that judicial review was necessary under these circumstances, the Court said of the composition of this System Board: "Nothing could more completely defeat the most elementary requirement of fair play: and nothing would more firmly entrench the recognized union in power; the temptation to fetch all jobs into that union would ordinarily be irresistible, especially when we remember that the union members of a 'System Board' are likely to be persons of consequence in the union itself." R. 43.



But such a ruling is at war with the whole pattern of the Railway Labor Act and the judicial interpretations rendered thereunder. From its origin in 1926, the Act has consistently provided for the establishment of boards of adjustment, with equal representation of the carrier and the employees, to decide disputes growing out of grievances or out of the interpretation and application of collective bargaining agreements.<sup>1</sup> Thus Section 3 of the original statute, 44 Stat. 578, made such provision. And the 1934 amendments to Section 3 established the National Railroad Adjustment Board, equally divided in membership between the carriers and labor organizations. 45 U.S.C. § 153, First. The 1934 amendments also preserved the right of the carriers and their employees to establish system, group or regional boards of adjustment with jurisdiction over these railroad labor disputes. 45 U.S.C. § 153, Second.

The System Board in this case arose out of the union shop agreement between the Brotherhood and the Pennsylvania, as authorized by Section 3, Second of the Act. 45 U.S.C. § 153, Second. The statute does not prescribe the form these system, group or regional boards must take. But following the general scheme of the Act, these boards usually are composed of equal numbers of carrier and union representatives. And so the System Board here was established with four members, two appointed by the Pennsylvania and two appointed by the Brotherhood (R. 15).

This System Board was created "for the sole purpose of handling and disposing of disputes arising

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<sup>1</sup> See Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567 (1937).



under this agreement" (R. 15), thus making an alternative method of adjusting and deciding disputes of the character that would otherwise go before the National Railroad Adjustment Board. Provision was made for a hearing and notice to the employee of the hearing, and it was agreed that the decisions of the System Board would be by majority vote and should be "final and binding" (R. 15).

As is convincingly demonstrated in the brief filed herein by the petitioner Pennsylvania Railroad Co. (pp. 13-21), the thirty-year history of these adjustment boards, with their equal divisions of membership, is one of general immunity from judicial review. Almost without exception the courts have held that the findings of such boards on the merits of the disputes are not subject to review or correction in the courts. Section 3 of the Act, as this Court has said, "represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements." *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239, 243. And the jurisdiction of these administrative boards "to adjust grievances and disputes of the type here involved is exclusive." *Ibid.*, 244. See also *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 562; *Colbert v. Brotherhood of Railroad Trainmen*, 206 F. 2d 9, 11-12 (C.A. 9), cert. den., 346 U.S. 931; *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (C.A. 3); *Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907 (D.C., Wash.).

The removal of these adjustment board determinations from the realm of judicial review reflects the general scheme of the Act to leave the resolution of rail-

road labor disputes to the private administrative techniques recognized by the statute. This Court has stated that "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied." *General Committee v. M-K-T R. Co.*, 320 U.S. 323, 337. To date no statutory command or legislative purpose has been found which would compel the acknowledgment of judicial review of the merits of system or adjustment board decisions, save for the provision of Section 3, First (p)—not here relevant—for the judicial enforcement of money awards of the National Railroad Adjustment Board.

But this general freedom from judicial supervision has not meant that system or adjustment boards are above or beyond the law. Courts have insisted that these administrative boards stay within their statutory and contractual jurisdiction, that their procedures be fair, and that their decisions be honest and free from fraud or corruption. See *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (C.A. 3); *Sigfried v. Pan American World Airways*, 230 F. 2d 13 (C.A. 5); *Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907 (D.C. Wash.). Judicial procedures have thus been made available to insure compliance with these general standards of fairness and statutory propriety.

But in these limited avenues of judicial review, the motivating element has been something other than the mere fact that half of the board membership was composed of union representatives. Such representation, one of the hallmarks of Railway Labor Act procedures, has not usually been thought to be so fraught with bias and prejudice against individual employees

as to justify the invocation of judicial review. See *United Railroad Operating Crafts v. Pennsylvania R. Co.*, 212 F. 2d 938, 942 (C.A. 7).

In only two instances have courts held that the inclusion of an equal number of union representatives on an adjustment board opened the door of judicial review. One was the decision of the Court of Appeals below. The other was the decision of the Court of Appeals for the District of Columbia in *Edwards v. Capital Airlines, Inc.*, 176 F. 2d 754. In the *Edwards* case, which dealt with a seniority dispute in which the union aggressively pressed the claims of its members adverse to the claims of the complainants, the court held that the System Board decision was not invalid per se and that it was entitled to presumptive weight of validity. But the award was held to be subject to judicial review since the union members on the Board could not be presumed to be impartial and protective of the rights of a non-member minority where the union was actively opposing the claims of that minority. In the instant case, however, the Court of Appeals did not attach any presumptive weight of validity to the System Board determination. It simply assumed bias from the presence of Brotherhood members on the System Board. And the resulting determination was thought to be so invalid as to justify a de novo judicial review of the merits of the dispute.

But the assumption that the union representatives on a System Board or any other adjustment board are necessarily biased against any claimant whose position is contrary to that of the union is not a realistic one. Congress must have known, in providing for and authorizing the inclusion of union representatives on the various adjustment boards, that these representa-

tives would be called upon to adjudicate claims which their unions contested.<sup>2</sup> Congress, in other words, had sufficient faith in the honesty, integrity and objectivity of union representatives called to serve on adjustment boards to sanction their inclusion and to fortify their decisions with a final and binding effect. Section 3, First (m). Courts should not lightly ignore the trust that Congress has thus exhibited.

The area in which Congress authorized the use of union representatives as adjustment board adjudicators of claims antagonistic to their unions is firmly established. The jurisdiction of these boards over disputes growing out of grievances or out of the interpretation or application of agreements is in no way limited. Clearly included, as acknowledged by the court below (R. 41), are union shop disputes such as is involved in the instant case. And a union shop dispute normally arises when an employee claims he has complied with the union shop agreement and the collective bargaining agent claims he has not. The union thereupon cites the employee for non-compliance, giving the employee the right to protest the citation before an adjustment board on which sit representatives of the union. The participation of these representatives in a case in which the union and the employee are in direct and real conflict thus becomes the intended and inevitable consequence of the statutory scheme of lodging the

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<sup>2</sup> By the same token, the members of the Brotherhood must be presumed to have known and to have acquiesced in the procedure established in the union shop agreement with the Pennsylvania whereby the System Board, with its two Brotherhood representatives, would adjudicate claims put forward by individual members which conflicted with the position of the Brotherhood. The respondent here was a member of the Brotherhood at the time this union shop agreement was made in 1952 (R. 7, 10)..



settlement of union shop disputes in the administrative boards established under Section 3.

Various other disputes arising under collectively bargained agreements can also bring the union into collision with the claims of an employee. The union may support the seniority rights of one group of employees under an agreement as opposed to another group, as occurred in *Edwards v. Capital Airlines, Inc.*, 176 F. 2d 755 (C.A.D.C.) and *Spires v. Southern R. Co.*, 204 F. 2d 453 (C.A. 4). Or the union may oppose a particular employee on some wage, hour or other working condition issue arising under the contract and coming within the jurisdiction of an adjustment board.

Thus if the employee's claim in these cases is denied, the rationale of the court below would permit him to obtain judicial review of the merits of the adjustment board ruling simply by pointing to the presence of union representatives on the board. There would be open to review issues which the courts have long held to be within the exclusive jurisdiction of the adjustment boards. A wide breach would then be made in the principle that the Railway Labor Act was designed to keep from the courts the function of reviewing the merits of administrative decisions dealing with labor disputes within the railroad industry.

At the same time, however, if the employee's claim in this type of case is sustained by the System Board, the union plainly would not have any right to judicial review based upon the composition of the administrative board. Thus the decision of the court below means in effect that the determinations of the System Board are "final and binding" only if they favor one party, the employee who differs with the union.



But it cannot be supposed that Congress had so little faith in the integrity of union representatives as to indicate a purpose that judicial review be available on the theory that the participation of these representatives automatically voided all their determinations on issues as to which the union differs with, and prevails over, the employee. As stated by the Court of Appeals for the Fourth Circuit in *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861, 867:

The argument that the Adjustment Board might not furnish a fair tribunal in cases of this character because certain members might be biased and prejudiced because of union affiliation furnishes no reason why the courts may ignore the fact that Congress has vested it with exclusive primary jurisdiction in such cases. *United Railroad Operating Crafts v. Pennsylvania R. Co.*, 212 F. 2d 938, 942-943 (C.A. 7). As said by Judge Conger in his opinion in the *United Railroad Operating Crafts v. Wyer*, *supra*, 115 F. Supp. 359, 365: "In view of the fact that I believe the Adjustment Board has jurisdiction, which the Supreme Court has said is exclusive, I am not certain whether there is room for concern over how plaintiffs will fare before the Board. And it is a fantastic thought that every employee who is discharged under a union shop agreement can run to Court about it."

See also *Colbert v. Brotherhood of Railroad Trainmen*, 206 F. 2d 9 (C.A. 9), cert. den., 346 U.S. 931; *Hayes v. Union Pacific R. Co.*, 184 F. 2d 337 (C.A. 9).

Carried to its logical extreme, the "presumptive bias" approach of the court below would jeopardize all System Board determinations of all controversies between parties to the agreement. By definition such

a controversy results from the strong conflicting positions they have taken with respect to the meaning or application of the agreement. It is, of course, these thus "biased" parties who compose the System Board created to resolve the controversy.

If an employee alleges or proves that the union representatives on an adjustment board were in fact biased and prejudiced against him personally to the extent of making it impossible for them to render a fair and impartial judgment, a judicially cognizable claim may have been stated. But merely noting the participation of such representatives and presuming their prejudice is to destroy a substantial part of the fabric of the Railway Labor Act. From its origin, the statute has been premised in part upon the utilization of union representatives in the administrative resolution of labor disputes. On that premise has grown the respect for these administrative rulings, a respect which the courts have consistently said obviated the necessity of judicial review. It is now too late in the day to rupture the whole pattern of the Act by a wholesale questioning of the integrity of union representatives.

The presumption of validity of the decision of this System Board should be retained. And in the absence of any allegation by respondent that the Brotherhood members of the Board were personally biased against him, that presumption must be maintained. To hold otherwise is to dispute the principle so long established that "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied," *General Committee v. M-K-T R. Co.*, 320 U.S. 323, 337, and that "Congress intended

to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Ibid.*, 333.

**II. THE PROVISIONS OF SECTION 3, FIRST (f) OF THE ACT AFFORD AN INDEPENDENT AND EXCLUSIVE ADMINISTRATIVE PROCEDURE FOR DETERMINING WHETHER A UNION IS NATIONAL IN SCOPE FOR PURPOSES OF THE ACT.**

**A. The function of the System Board regarding the "national in scope" issue**

The particular issue before the System Board of Adjustment in this case was whether the respondent had complied with the union shop agreement (R. 13) by maintaining membership in a union "national in scope" and "organized in accordance with the Railway Labor Act." This requirement arose from the provision of Section 2, Eleventh (c) that where a union shop prevails the union shop provision is satisfied if the employee holds membership "in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees" of the operating crafts.

It was assumed by the Court of Appeals below that the System Board actually determined the issue of whether UROC, the union here in question, was "national in scope." Such an assumption is not supported by the record. The System Board merely held that respondent's "membership in the United Railroad Operating Crafts does not constitute compliance with the Union Shop Agreement." R. 17-18. That such a determination did not involve a resolution of the status of UROC is acknowledged by respondent in the affidavit accompanying his complaint (R. 11), where it is said that "in spite of the fact that there had been

no conclusive determination of the status of the said UROC, and despite the fact that administrative proceedings have been instituted by the said UROC to have itself recognized as national in scope," the respondent received the aforementioned ruling of the System Board.

Indeed, the question of whether UROC was in fact "national in scope" was not an issue over which the System Board had any discretionary jurisdiction.<sup>3</sup> That issue, as impliedly conceded by respondent in his reference (R. 11) to "the fact that administrative proceedings have been instituted by the said UROC to have itself recognized as national in scope," was one within the exclusive jurisdiction of the special three-man board established by Section 3, First (f). The function of the System Board in this connection was reduced to the perfunctory or ministerial one of determining whether UROC had been qualified as a union "national in scope" pursuant to the procedures set forth in Section 3, First (f). If UROC had not so qualified itself, the System Board had no discretion but to determine, as it did in this case, that membership in UROC does not constitute compliance with the union shop agreement. On the other hand, if UROC

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<sup>3</sup> Various courts have reasoned that "national in scope" was a matter of contract interpretation to be determined by the National Railway Adjustment Board or the various System Boards. See, for example, *United Railroad Operating Crafts v. Northern Pacific R. Co.*, 208 F. 2d 135 (C.A. 9); *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861 (C.A. 4); *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317 (N.D. Ill.), aff'd, 347 U.S. 964; *Bohnen v. Baltimore & O.C. Term R. Co.*, 125 F. Supp. 463 (N.D. Ind.). But it is submitted that such reasoning fails to give proper effect to the impact of Section 3, First (a) and (f) on Section 2, Eleventh (c) and the integrated pattern of procedure before the special three-man board that these sections reveal.

had been qualified in this manner, the System Board would have been compelled to recognize that the maintenance of membership in UROC, assuming proper proof thereof by respondent, satisfied the union shop requirement.

Hence there was no room for the Brotherhood members of the System Board to exercise any degree of discretion as to the "national in scope" issue or to exhibit or activate the bias and prejudice toward the respondent which the court below presumed to be in existence. Significantly, the respondent in his complaint made no claim that he was the victim of bias or prejudice on the part of Brotherhood members with respect to the "national in scope" issue.

**B. The function of the three-man board regarding the  
"national in scope" issue**

But even assuming that there might be some degree of bias or prejudice implied from the participation of the Brotherhood members on the System Board in this type of case, the availability of a completely independent three-man board, created pursuant to Section 3, First (f) for the express purpose of deciding the "national in scope" issue, protects the respondent from any possible harm.<sup>4</sup> In the words of the Court of Appeals for the Sixth Circuit in *Pigott v. Detroit, T. & I. R. Co.*, 221 F. 2d 736, 740,<sup>5</sup> employees like the respondent "are not denied due process of law where

<sup>4</sup> The availability of such an independent board to decide the issue of "national in scope" serves to distinguish this case from *Edwards v. Capital Airlines, Inc.*, 176 F. 2d 754 (C.A.D.C.), where there was no other agency available to decide the questions of seniority which the System Board had before it. The court below adopted the *Edwards* case as precedent for its decision. R. 43.

<sup>5</sup> Noted in 56 Col. L. Rev. 271 (1956).



there is the right to secure a fair determination whether their labor organization is 'national in scope' available to them, or, rather, to such labor organization, even though the administrative machinery for making such determination must be availed of in proceedings under the Act to qualify for the right to select members of the National Railroad Adjustment Board." See also *United Railroad Operating Crafts v. Pennsylvania R. Co.*, 212 F. 2d 938, 942 (C.A. 7).

The union shop provisions of Section 2, Eleventh (c) were enacted by Congress in 1951 as an amendment to the Act. And in referring to the holding of membership in other labor organizations "national in scope" and "organized in accordance with this Act", this amendment incorporated the identical qualifications set forth in Section 3, First (a) for union seeking to qualify for participation in the selection of labor representatives on the National Railroad Adjustment Board.<sup>6</sup>

Section 2, Eleventh (c), it is true, remains silent as to the manner in which these qualifications are to be determined for purposes of the union shop provision. In contrast, Section 3, First (f) provides a specific administrative procedure before a special three-man board for the precise purpose of determining whether a union is national in scope and organized in accordance with this Act so as to qualify under Section 3,

<sup>6</sup> The phrase "national in scope" also appears in the Railroad Retirement Act of 1937, 45 U.S.C. § 228a(a), and in the Railroad Unemployment Insurance Act, 45 U.S.C. § 351(a), both of which use it in referring to railway labor organizations. Under those laws, jurisdiction for determining "national in scope" status devolves upon the general counsel of the Railroad Retirement Board. Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. L. J. 441, 445 (1955).

First (a) for the selection of labor representatives on the National Railroad Adjustment Board.

Under the Section 3, First (f) procedure, if there is a dispute as to the qualifications of a labor organization as set forth in Section 3, First (a), the Secretary of Labor investigates the claim of the organization and if in his judgment the claim has merit he notifies the National Mediation Board. The Mediation Board thereupon establishes a special three-man board to decide the qualifications of the labor organization. The findings of this special three-man board are made "final and binding" by the terms of Section 3, First (f). No suggestion has been made that such a board would be biased or prejudiced against the labor organization seeking qualification or that the procedure before the board is not readily available to the labor organization.

The legislative history of the 1951 amendments to the Act, wherein the union shop provisions of Section 2, Eleventh (c) were adopted, contains no affirmative or definitive statements on the intention of the drafters of this provision as to how or by whom a union was to be qualified as "national in scope" for purposes of the union shop requirement.<sup>7</sup> It must be assumed,

<sup>7</sup> The language of Section 2, Eleventh (c) in question was not a part of the original union shop bill in Congress (S. 3295, 81st Cong.) and was not referred to in any of the accompanying reports (see S.R. 2262, 81st Cong., 2d Sess.). On September 23, 1950, however, Senator Hill offered an amendment on the floor of the Senate to the effect that no union shop agreement "shall require membership in more than one labor organization." 96 Cong. Rec. 15735. The purpose of this amendment was said to be to assure that an employee would not lose his job because of lack of membership in the union representing the craft or class in which he is located if he maintains his membership in the union representing the class or craft from which he has been transferred. But on December 7, 1950, Senator Hill offered a new amendment using

however, that they intended that the procedures of Section 3, First (f) be utilized for this purpose. Those procedures are consistent with the basic scheme of the Act for the settlement of labor issues through the administrative processes authorized by the statute, and there is no reason to suppose that the authors of Section 2, Eleventh (c) intended to do violence to that basic scheme.

It is significant that when Congress enacted the union shop amendments in 1951 it was adding to a statutory structure which had long been in existence. Thus the new Section 2, Eleventh (c), in its reference to unions "national in scope", was a mere adoption of the phrase that had been in use in Section 3, First (a) for nearly seventeen years. And that adoption took place with full knowledge of the existence of Section 3, First (f) and its settled and complete method of determining when a union was "national in scope." There was thus no reason for Congress to recreate an established administrative process. And there is even less reason to surmise that Congress intended to break completely with the past pattern and to authorize a wholesale invasion of the exclusive administrative processes by the judiciary.

The Court of Appeals below, however, failed to realize the complete intertwining of Section 2, Eleventh (c) and Section 3, First (a) and (f). It said (R. 42-43) that when a union seeks to qualify as an elector in a proceeding under Section 3, First (f) it must satisfy two conditions other than being "national in

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the language now appearing in Section 2, Eleventh (c). 96 Cong. Rec. 16260. It was said that the new amendment had the same intention and purpose as the prior amendment, but merely spelled out such intention and purpose in greater detail.

scope"—i.e., it must be "organized in accordance with" the Act and it must be "otherwise properly qualified to participate in the selection of the labor members" of the National Railway Adjustment Board. The union shop provision in Section 2, Eleventh (c), on the other hand, refers only to two conditions to be met by an alternative union; it must be "national in scope" and "organized in accordance with this Act."

But a careful reading of these various provisions reveals the identity of their standards. The reference in all of them to a union being organized in accordance with the Act, or Section 2 thereof, obviously means that the union must not be a company dominated organization (Section 2, Fourth). The last sentence of Section 3, First (f) speaks of a union being "otherwise qualified to participate in the selection of labor members." This plainly refers to qualifications, other than being properly organized, that are necessary for participation in selecting labor members of the Adjustment Board. And those qualifications are to be found only in Section 3, First (a). But the only other qualification mentioned in the latter section is that the union must be "national in scope". Hence there is complete identity of the standards or qualifications set forth in these three sections—the union must be "national in scope" and it must be "organized in accordance with the Act." See Note, 69 Harv. L. Rev. 1512, 1514. It is that identity that makes it appropriate to apply the procedures of Section 3, First (f) to the determination of the existence of the standards set forth in Section 2, Eleventh (c).

This statutory coordination of Section 2, Eleventh (c) and Section 3, First (a) and (f) is confirmed by several practical considerations:



(1) The determination of whether a union is "national in scope" for purposes of the union shop requirement under Section 2, Eleventh (c) is well suited to a single, authoritative determination under Section 3, First (f). The concept of "national in scope" is obviously one that should possess the same meaning and application whatever the particular context. It would be anomalous for a union to be considered "national in scope" for purposes of selecting labor representatives on the Adjustment Board, while not being considered "national in scope" for purposes of the union shop requirement, or vice versa. To insure uniformity of decision and to avoid the possibility of diverse interpretations and applications of the concept, a single authoritative body whose decisions are "final and binding" is most appropriate in the determination of this issue.<sup>8</sup> The special three-man board established by Section 3, First (f) is such an authoritative body.

(2) If the determination of whether a union is "national in scope" for union shop purposes were left

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<sup>8</sup> "A labor organization which is national in scope would be present in more than one jurisdiction and would have relationships with more than one carrier. If the question of its status were open to the courts, which are located in various areas of the nation, it is conceivable that such different jurisdictions would reach contrary conclusions if concurrent suits with separate carriers were to be litigated. During the delay while matters are being heard and pending the appellate resolution of possibly conflicting results, a serious element of doubt and confusion would be injected into an industry whose uninterrupted operation is essential to the national welfare. The creation of a single, central, competent agency which is itself national in scope and is thus capable of dealing with these problems that touch every state of the union, obviates this risk and makes possible a more speedy determination." *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 954 (E.D. Mich.), *aff'd*, 221 F. 2d 736 (C.A. 6).



to the various courts or to the various adjustment boards, not only would there be a variety of results but the burden of establishing the national status of the union would be placed on the individual complainant. In determining the "national in scope" status of a union, such criteria must be applied as the number and geographic dispersion of the union's members, the number of its lodges or locals, the number and geographic dispersion of the carriers with which it has agreements, the number of employees for whom it holds bargaining rights, the age of the union, the number of grievances it has processed before the National Railroad Adjustment Board, whether it has organizational affiliations with other unions, and the like. See Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. L.J. 441, 445 (1955).

These factors are obviously ones which are beyond the knowledge and the competence of any single individual as such. They are matters which pertain to the labor organization and which should be and must be proved by it. In many proceedings before adjustment boards and courts, however, the union will not be a party. If decision as to the "national in scope" status of the union is to be made by the Adjustment Board or court, the decision may well be reached without the benefit of the labor organization's views. Only the procedure established by Section 3, First (f) insures the participation by the union in the process of determining its status for union shop purposes.

(3) The concept of "national in scope" is peculiarly fitted to expert administrative determination under the Act rather than to the ordinary decisional techniques of judicial tribunals. As stated by Judge Levin in

*Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 954 (E.D. Mich.), aff'd, 221 F. 2d 736 (C.A. 6):

The history of the legislation, the peculiar characteristics of the type of labor organization concerned, the qualifications of other labor organizations already deemed to be qualified and the tensions existing as a result of inter union rivalry must all be taken into consideration. It is the type of issue which those that are conversant with the specialized problems of the railroad industry are most capable of evaluating.

Such a determination can best be made through the selection of an expert board pursuant to the provisions of Section 3, First (f),<sup>9</sup> a procedure that is consistent with the statutory policy of favoring administrative settlement of the unique problems in the railroad labor field. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 242-243.

(4) The special three-man board is so constituted under Section 3, First (f) as to eliminate any possibility of the "national in scope" issue being determined by an agency half composed of representatives of rival unions. In contrast to the usual system board, with half of its personnel affiliated with the collective bargaining agent, and the National Railway Adjust-

<sup>9</sup> "The determination of whether a union is 'national in scope' requires an extensive investigation by persons familiar with the railway labor field. The administrative personnel who would rule on a petition for membership in the NRAB are well acquainted with the factors that must be considered, and a determination by these experts involves a simple and inexpensive procedure. Furthermore, having analogous problems decided by one body promotes uniformity of decision and avoids needless litigation in the courts." Note, 56 Col. L. Rev. 271, 274 (1956).

ment Board, with half of its 36 members selected by the established unions, the three-man board is composed of one representative of the established unions, one representative of the claimant union, and a third or neutral party designated by the National Mediation Board. Thus this board is immune from any suggestion of partiality or unfairness in its make-up,<sup>10</sup> making it appropriate to conclude that this was the agency Congress intended to utilize in applying the standards of Section 2, Eleventh (c).

**C. The misconceptions of the court below as to the three-man board procedure**

The availability of the remedy afforded the claimant union through the machinery of Section 3, First (f) was said by the Court of Appeals below to be inadequate to protect the respondent's rights since he could not compel the union to apply for elector status (R. 43). But this criticism reflects a misconception as to respondent's rights, a mistaken notion that the respondent has the individual right to have adjudicated the "national in scope" status of the labor organization to which he belongs.

The concept of a union "national in scope" is one that adheres to the labor organization rather than to any member or individual. The "national in scope" language of Section 2, Eleventh (c) emphasizes the rights of a union "national in scope" to enlist em-

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<sup>10</sup> See *United Railroad Operating Crafts v. Pennsylvania R. Co.*, 212 F. 2d 943, 942 (C.A. 7), where the court indicated that the administrative machinery of Section 3, First (f) obviated any possible disadvantage to an employee growing out of any conflict of interest between UROC and the labor representatives on the National Railroad Adjustment Board. See also *Pigott v. Detroit, T. & I. R. Co.*, 221 F. 2d 736, 742 (C.A. 6).

ployees on the basis of its privileged statute and to insure them that membership therein satisfies the union shop requirement. This language, in terms of the rights of individuals, means only that they have the right not to be discharged if they belong to a union that has duly qualified itself as "national in scope." And, in order to acquire the privileged status of a union "national in scope," the union in question must qualify for and participate in the Adjustment Board machinery and be recognized there as a union "national in scope."

Thus the individual who desires to join a particular union and to retain his job under a union shop agreement must depend upon that union already possessing proper status under the Act. He joins the union at his peril.<sup>11</sup> He has no right to insist that the union thereafter qualify as one "national in scope" by applying for elector status under Section 3, First (a). His only right is that if he joins a union that has already so qualified he cannot be discharged under the union shop provision.

The "national in scope" concept, in other words, does not significantly refer to the rights of any individual. It is a concept that has meaning only with reference to a labor organization, a concept that can

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<sup>11</sup> "Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c)." *Alabaugh v. Baltimore & Ohio R. Co.*, 125 F. Supp. 401, 407 (D. Md.), *aff'd*, 222 F. 2d 861 (C.A. 4).



be activated only when that labor organization initiates proceedings under Section 3, First (f). If the union really wants to provide its members with job security under the union shop requirement, it will initiate those proceedings. The fact that no member or other individual can compel the union to invoke the proceedings is immaterial. If the union fails to seek qualification through the Section 3, First (f) procedure<sup>12</sup> it will thereby warn all employees in advance of the grave risk they take in joining a union that lacks elector status. See Note, 69 Harv. L. Rev. 1512 (1956). But the individual does not hereby lose any rights under the statute. He is merely put on notice that membership in such a union will not constitute compliance with the union shop requirement.

One result of imposing upon the union the obligation of utilizing the procedures of Section 3, First (f) if it desires "national in scope" status is to remove the possibility of a non-national union enjoying status under the Act without assuming "its fair share of the burdens and responsibilities attendant upon the administration of the Act." *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 955 (E. D. Mich.), aff'd, 221 F. 2d 736 (C.A. 6). Most of the financial cost of enforcing the Act and maintaining its administrative processes is borne by the qualified unions. That cost is reflected in the dues of each qualified union. Unless a union were obligated to participate in the Adjustment Board machinery before qualifying under the union

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<sup>12</sup> "It seems probable that any union refusing to so petition would be motivated chiefly by expectation of certain refusal." Note, 56 Col. L. Rev. 271, 274 (1956). See *Brotherhood of Locomotive Engineers v. Chicago, B. & Q. R. Co.*, 116 N.R.A.B. (First Div.) 532; Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. L. J. 441, 446 (1955).



shop requirement, it might acquire an unfair advantage over the qualified unions by way of reduced dues.

The Court of Appeals below also felt (R. 43) that the three-man board constituted pursuant to Section 3, First (f) might not make a specific finding that a union is not national in scope and that it would then be impossible to know whether this was in fact its ground for refusing to qualify the union. A proceeding that might leave this issue undecided, said the court, "can hardly be intended as a remedy for any bias of the 'System Board.'"

Such statements again reflect the court's incomplete reading of the statute. The issue that would be presented to the three-man board is whether the union was qualified as an elector under Section 3, First (a).<sup>13</sup> As already noted, the two qualifications under that section are that the union must be "national in scope" and "organized in accordance with the provision of section 2 of this Act." Those are the identical qualifications under Section 2, Eleventh (c), the union shop section. Thus the determination of the three-man board must necessarily be in terms of one or both of these standards, either of which is decisive under the union shop provision. The suggestion that the board might not affirmatively rule on the "national in scope" issue cannot negate the fact that the only issues before the board and the only possible bases of its determination are matters that are conclusive of the union shop

<sup>13</sup> Section 3, First (f) says that the Board shall decide whether the union "was organized in accordance with section 2 hereof and is otherwise qualified to participate in the selection of the labor members of the Adjustment Board." The only other qualification for participating in such selection, of course, is that the union be "national in scope", as provided in Section 3, First (a).

qualification. Thus the board's ruling, regardless of whether it specifically mentions the "national in scope" issue, must of necessity be responsive to the issues posed by both Section 3, First (a) and Section 2, Eleventh (c).

Perhaps the most drastic effect of the lower court's decision is to impose on every union shop agreement in the railroad industry an ineluctable uncertainty as to its meaning. Under that decision the contracting parties are denied the elementary right to reach conclusive, mutual understanding of their own contract references to unions "national in scope." Instead, every effort to apply a union shop clause to an employee claiming membership in another union that is "national in scope"—no matter how thin or unfounded the claim—is subjected to the delays and uncertainties of judicial review and reversal. That such a result unnecessarily flouts the essential purpose and design of the statute is, we submit, self-evident.

Section 2 of the statute announces the purpose "to provide for the *prompt* and orderly settlement of *all disputes* growing out of . . . the interpretation or application of agreements . . ." (Emphasis supplied). Section 2, Second provides: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in *conference between representatives* designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Emphasis supplied). See also Section 2, Sixth, and Section 3, First (i), which reiterate the duty to seek the negotiation of differences by conferences between authorized representatives. *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 722.

But under the lower court's decision such conferences, like the more formal action of system boards, can make no definitive determination against the contention of an employee that he belongs to a union "national in scope". This means, of course, that the contracting union cannot effectively enforce its lawful union shop agreement by the prompt and orderly procedures prescribed by the statute. It means, inevitably, a multiplication of disputes threatening interruption to commerce rather than the diminution of such disputes contemplated by the statute, and it means delays in their settlement rather than the expedition expressly urged by the statute. Thus the court's reasoning ignores Congress' plain intent to have the Act serve as "an instrument of peace rather than of strife." *Texas & N.O.R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548, 570. And it does so in the face of a simple and cohesive statutory plan of resolving the "national in scope" issue, a plan which would give the parties to the union shop agreement a definite means for applying the union shop requirement to those claiming membership in unions "national in scope". Under that plan the parties need only determine whether the organization in question has been qualified as of that time under the Section 3, First procedure.

When the orderly consequences of reading Section 2, Eleventh (c) in conjunction with Section 3, First (a) and (f) are compared with the disruptive confusion resulting from the statutory analysis adopted by the court below, the choice becomes unmistakable. An available, workable remedy within the framework of the Act is not lightly to be discarded, particularly at the expense of creating an unnecessary and chaotic

departure from the purposes and principles of the Act.

### CONCLUSION

As this Court has said, the Railway Labor Act "represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements." *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 243. That effort is evident in the context of Section 2, Eleventh (c). Congress has provided an "effective and desirable" administrative remedy for the resolution of the "national in scope" issue, a remedy to be found in the procedure of Section 3, First (f). And a proper appreciation of the function of the system boards in connection with that issue makes plain that there is no "presumptive bias" on this issue arising from the participation of representatives of established unions in the system board determinations. The mere presence of such representatives is not enough to justify the invocation of judicial review.

It follows that there is no jurisdiction in a federal district court to review the merits of a system board determination of the type involved in this case. The judgment of the Court of Appeals below should therefore be reversed and the judgment of the District Court for the Western District of New York dis-

missing respondent's complaint for failure to state a cause of action should be reinstated and affirmed.

Respectfully submitted,

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October 1, 1956.



## APPENDIX

### Relevant Statutory Provisions

Sections 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1186, 1189, 64 Stat. 1238; 45 U. S. C. §§152, 153) provide in part as follows:

“Section 2. . . .

“Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

“(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties uniformly required

as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him; Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organi-

zation to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

“SEC. 3. First. There is hereby established a Board, to be known as the ‘National Railroad Adjustment Board’ the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

“(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

“(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

“(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection



of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party:

“(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

“First division: To have jurisdiction over disputes involving train and yard service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

“Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

“Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees,



freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members five of whom shall be selected by the carriers and five by the national labor organizations of employees.

“Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

“(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

“(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

“(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to con-

duct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

“(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as ‘referee’, to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board should be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

“(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the representative parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

“(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum of which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States: If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun with two years from the time

the cause of action accrues under the award of the division of the Adjustment Board, and not after.

• • •

“Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.”

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IN THE

**Supreme Court of the United States**

October Term, 1955

No. 821 *56*

PENNSYLVANIA RAILROAD COMPANY and BROTHER-  
HOOD OF RAILROAD TRAINMEN,

*Petitioners,*

*vs.*

N. P. RYCHLIK, individually and on behalf of and as repre-  
sentative of other employees of the Pennsylvania Railroad,

*Respondent.*

**Respondent's Brief in Opposition to the Petition for Writ  
of Certiorari to the United States Court of Appeals  
for the Second Circuit.**

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Petitioners,  
vs.

N. P. RYCHLIK, individually and on be-  
half of and as representative of other  
employees of the Pennsylvania Rail-  
road,

Respondent.

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

### Questions Presented.

1. Is the decision of a System Board of Adjustment, established under Section 3, Second of the Railway Labor Act subject to judicial review, where the Board is comprised of an equal number of representatives from the carrier and from the labor organization charging and prosecuting the cited employees with non-compliance of the Union Shop Agreement, and where the employees' job

and seniority rights depend on whether the Board finds a rival labor organization to be national in scope?

2. Does Section 3, First (f), which provides an administrative procedure for a labor organization to be determined to be national in scope for the purpose of securing representation on the National Railroad Adjustment Board, provide an adequate remedy to an employee-member of a rival labor organization for lack of due process where the same interested organization acts as accuser, prosecutor, judge and jury in determining whether an employee has complied with the Union Shop Agreement?

### **Statement of the Case.**

On April 19, 1956, the United States Court of Appeals for the Second Circuit denied the petitioners' motion to stay proceedings on the mandate and also denied respondent's counter-motion for injunction pending appeal.

### **Reasons For Not Granting the Writ.**

1. Respondent can not accept petitioners' "Questions Presented." Petitioners' first question is broader than the case. Appellee is not contending, and never has contended, that the decision of the System Board is subject to review by a District Court solely because representatives of the labor organization representing employees of the carrier are members of such Board and participated in the decision. What we are contending and what the Court below held is that there must be review from the decision of the Board where half of that Board is composed of members of the same union which cited and prosecuted the charges against the employee, and where the same half of the Board belong to the very organization which has the most vital interest in having a rival organization

declared not to be national in scope. That this procedure which allows union representatives to act as prosecutor, judge and jury, is unfair, was recognized by the Sixth Circuit in *Pigott, et al., v. Detroit T. R. R. Co.*, 116 F. Supp. 949, affirmed 221 F. 2d 736, as well as the Court below. Thus, District Judge Levin, in an opinion cited with approval by the majority in the Court of Appeals in the *Pigott* case, *supra*, stated:

"Because of the conflict of interests between the established union and a 'new' union, the National Railroad Adjustment Board is not a competent agency to review the qualifications of such a labor organization. With half of its members selected by the established union, it is not likely that they would regard with equanimity the claim of a 'new' union, a rival to one or more of the members' organizations. This pressure to protect the vested interest would be even greater were the matter to be heard by a System Board of the type before which the plaintiffs appeared in the instant case. That Board, as has been stated, was made up of one representative of the railroad and one representative of the Brotherhood" (p. 954).

Thus, the "veritable Pandora's Box" read into the decision of the Court below by petitioners (see page 11 of the petition) is in reality a "no trespassing" sign which the Court below erected to prevent the abuses inherent in the form of a self-perpetuating procedure the petitioners are asking this Court to approve.

A similar decision with almost identical facts was made by the Court of Appeals for the District of Columbia in *Edwards v. Capital Airlines*, 176 F. 2d 755, cert. den. 338 U. S. 885, decided in 1949, without opening a "veritable Pandora's Box." As a matter of fact, in the seven years since the decision in the *Edwards* case, *supra*, that case has been cited but six times, not including the present

case. Only four of these cases citing the *Edwards* case, *supra*, dealt with the Railway Labor Act,<sup>1</sup> all of them approving the *Edwards* case, *supra*, as good law. In 1953, *Farris v. Alaska Airlines*, 115 Fed. Supp. 909, a case approving a limited review of the decisions of System Boards, specifically recognized the exception drawn by the *Edwards* case, *supra*, and no flood of litigation followed.

2. The fundamental issue is the second question. Does Section 3, First (f) provide an adequate statutory remedy to the obvious bias of the System Board and if it does, does this deprive a Federal Court of jurisdiction to review the decision of the System Board? It is on this point that the majority in the *Pigott* case, *supra*, and the three judges who decided the case in the Court below are in conflict.

Section 3, First (f) of the Act, provides that a union must be "national in scope" in order to participate in a selection of labor members to the National Railroad Adjustment Board. It defines the procedure which a union must follow to be eligible to select members to the National Railroad Adjustment Board. First, a union must request of its rival labor organizations already on the Board the right to participate on the Board, and bring about a dispute as to its right to participate. Given such a dispute, the Secretary of Labor refers it to the three-man Board provided by Section 3, First (f), and such Board will decide whether the petitioning organization is qualified: that is, whether *among other things*, it is "national in

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<sup>1</sup> *Barbee v. Capital Airlines*, 191 F. 2d 507 (deals with another aspect of the *Edwards* case—veteran's rights); *Dwellingham v. Thompson*, 91 Fed. Supp. 787 (cites *Edwards* case as standing for review of System Board action); *Farris v. Alaska Airlines*, 115 Fed. Supp. 909 (discussed *supra*); *Nichols v. National Tube Co.*, 122 Fed. Supp. 727 (does not deal with RLA but cites *Edwards* case because of conflict in interest of bargaining representative); *Sadler v. Union Railroad Co.*, 125 Fed. Supp. 912 (cites *Edwards* case as standing for proposition of review of System Board action); *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (dissenting opinion).



scope." It is this procedure which the majority in the *Pigott* case, *supra*, held was the *sole* manner in which national in scope status may be obtained, not only for the purpose of selecting labor members to the Board but also for the purpose of obtaining a so-called privileged standing as a union, membership in which constitutes compliance with the Union Shop Agreements. The petition alleges that this is an adequate remedy to any alleged bias of the System Board and the *sole* manner in which national in scope status may be obtained.

But, this Court has already indicated that the determination of the three-man Board under Section 153, First (f) is *not* the sole way in which national in scope status may be attained. Thus, in *Order of Railway Conductors v. Swan*, 329 U. S. 520, 522-523, 91 L. ed. 471, 475, this Court characterized the Railroad Yardmasters of America as a "national labor organization" although that organization had failed to place any representatives on any one of the four divisions of the National Railroad Adjustment Board. In that case this Court referred to the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, both of which organizations have representatives on the National Railroad Adjustment Board, as "national labor organizations." The Court then stated:

"But that contention is contradicted by the railroad Yardmasters of America, a national labor organization composed almost entirely of yardmasters and claiming to represent more than 70 per cent of all the yardmasters in the country. That organization, . . . *has failed to place a representative on any of the four divisions*" (p. 523) (italics supplied).

Either petitioners claim this Court used extremely loose language in referring to the Railroad Yardmasters of America as a "national railroad organization," or they are imposing a highly artificial construction on the Rail-

way Labor Act when they urge that the sole manner of acquiring national in scope status is before the three-man Board set up under Section 153, First (f). What petitioners are doing is solidifying a "jurisdictional frustration on an administrative level" (*Swan case, supra*, p. 524).

Further, this Court has recently held that a Federal Court is empowered to determine whether a labor organization is a "national or international organization." The National Labor Relations Board, which did not have representatives of the labor organization in question sitting on its panel, had held that such organization fell within the purview of the statutory phrase. This Court affirmed a Federal Court decision which determined otherwise (*NLRB v. Highland Park Mfg. Co.*, 341 U. S. 322). As Judge Allen stated in the dissenting opinion in the *Pigott case, supra*:

"It is equally appropriate for a Federal Court to determine whether a labor organization is 'national in scope.' The expertise demanded in one case is no greater than the other. If Congress intended the geographic subjectives to have other than their ordinary civil meaning it would have given them a special meaning by definition" (p. 743).

In *U.R.O.C. v. Pennsylvania Railroad Company*, 212 F. 2d 938 (C. A. 7), the Court decided only that the employee must first exhaust his remedies before the System Board or the National Railroad Adjustment Board. The Court recognized, but only in dictum, the procedure specified in Section 3, First (f) of the Act, but assumed that this was not the only way in which "national in scope" status might be obtained. Thus the Court stated:

"It is evident from these provisions of the Act that only those labor organizations which are na-

tional in scope may participate in the selection of labor members of the Adjustment Board, though, of course, an organization could have such status without so participating" (pp. 942-943).

Petitioners argue that the position adopted by the Court below in this case rejects the basic assumption of the Railway Labor Act that family quarrels in the Railroad industry should be settled exclusively within the confines of the structure erected by the Act. But, the landmark case which established petitioners' basic assumption, *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, specifically excluded a case like the one at bar from the basic assumption which petitioners advance. Thus this Court stated in Footnote 7 at page 244 of its opinion:

"We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele v. Louisville and N. R. Co.*, 323 U. S. 192, 89 L. ed. 173, 65 Sct. 226. Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction."

Finally, petitioners argue that the decision below violates Congressional intent. But, if this is so, why did Congress take pains to amend Section 2, Fourth and Section 2, Fifth of the Act, in order to make them consistent with the Union Shop provisions, and completely fail to amend Section 3, First (f) to extend its coverage to include questions of compliance with the Union Shop Agreement or define "national in scope."

3. We agree that this case raises important and novel problems in the administration of the Railway Labor Act, but do not agree that now is the time for review by this Court. If the Court decides to review the present case now, it will only be deciding half a case. The basic question inherent in this case is what is the definition of na-

tional in scope, and more exactly when is a union "national in scope." That issue is not presented by this case at its present posture, and it will not be presented until the case is remanded to the District Court for trial in accordance with the opinion of the Court below. The cases cited clearly show that there is a judicial right to review the decisions of the System Board, and that Section 3, First (f) is not the only way in which national in scope status may be attained. The exception to the judicial thinking on these issues is the majority opinion in the *Pigott* case, *supra*. Would it not be wiser and more in accord with the guiding principles set down by this Court in its rules for review, if the Court waited until all of the issues are presented? At that time, if the Court so desires, the issues presented by this petition together with the entire issue of when is a union national in scope can be reviewed.

### CONCLUSION.

For the foregoing reasons, the petition for a writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

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IN THE  
**Supreme Court of the United States**  
October Term, 1956.

**No. 56.**

**PENNSYLVANIA RAILROAD COMPANY and  
BROTHERHOOD OF RAILROAD TRAINMEN,**  
*Petitioners,*  
*vs.*

**N. P. RYCHLIK, Individually and on Behalf of and as Representative of other employees of the Pennsylvania Railroad,**  
*Respondent.*

**RESPONDENT'S BRIEF.**

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# Supreme Court of the United States

OCTOBER TERM, 1956.

No. 56

PENNSYLVANIA RAILROAD COMPANY and  
BROTHERHOOD OF RAILROAD TRAINMEN,  
Petitioners,

vs.

N. P. RYCHLIK, Individually and on Be-  
half of and as Representative of other  
employees of the Pennsylvania Rail-  
road,

Respondent.

## RESPONDENT'S BRIEF.

### Questions Presented.

1. Is the decision of a System Board of Adjustment, established under Section 3, Second, of the Railway Labor Act, subject to judicial review, where such Board is comprised of an equal number of representatives from the carrier and from the labor organization charging and prosecuting the cited employees with non-compliance of the Union Shop Agreement, and where the employees' jobs and seniority rights depend on whether such Board finds a rival labor organization of which the cited employees are members to be "national in scope"?

2. Does Section 3, First (f), which provides an administrative procedure for a Railroad labor organization to be determined to be national in scope for the purpose of securing representation on the National Railroad Adjust-

ment Board provide an adequate remedy to an employee and member of a rival labor organization for lack of due process where the same interested labor organization acts as accuser, prosecutor, judge and jury in determining whether an employee has complied with the Union Shop Agreement?

### **Statement of the Case.**

The respondent, and his fellow trainmen, had been in the employ of the Pennsylvania Railroad Co. (hereinafter referred to as Pennsylvania) and at various times were members of the Brotherhood of Railroad Trainmen (hereinafter referred to as BRT) (R. 3; Affid., par. 3, R. 10).

As permitted by the 1951 amendment to the Railway Labor Act (45 U. S. C. A., Section 151 et seq.) Pennsylvania and the BRT, the employees' bargaining representative, entered into a Union Shop Agreement effective April 1, 1952, substantially identical in its terms with the pertinent statutory language (Exhibit A attached to the Complaint, R. 12-17). The Agreement, in accordance with the Act, provided that the requirement of membership in the BRT should not be applicable to employees who maintain membership in any one of the labor organizations, "national in scope," organized in accordance with the Act and admitting to membership employees of a craft or class in any of the operating services (R. 13). A System Board of Adjustment was established, composed of two union and two carrier representatives, to decide disputes arising under the Agreement (R. 15-16).

Before respondents dropped their membership in the BRT they were members in the United Railroad Operating Crafts (hereinafter referred to as UROC) (Affid. par. 3, R. 10). The BRT requested the Pennsylvania to terminate the employment of respondent, and his fellow

trainmen employee, for non-compliance (Affid. par. 4, R. 10). After demand, a hearing was held before the System Board of Adjustment to determine their compliance with the Union Shop Agreement. The first hearing was held on August 27, 1953. No decision was reached and on August 23, 1954, a second hearing was held before the System Board of Adjustment (Affid. par. 4; R. 10). By Pennsylvania letter dated January 3, 1955, the respondent, and his fellow trainmen employees, were individually informed that the Board decided that the respondent and his fellow trainmen employees, had not complied with the membership requirements for continued employment as set forth in the Union Shop Agreement, since membership in UROC did not constitute compliance with said Agreement (Exhibit B attached to the complaint, R. 17-18).

Respondent, and his fellow employees, were notified by telephone, on January 14, 1955, that they were no longer in the employ of the Pennsylvania (Affid. par. 8; R. 11). Subsequently, on January 17, 1955, respondent and his fellow trainmen employees, received written notices to the effect that they had been discharged (Exhibit C to the complaint, R. 18; Affid. par. 10, 11; R. 12).

On January 28, 1955, after his discharge, respondent filed a complaint in the United States District Court for the Western District of New York against petitioner, Pennsylvania and BRT intervened. The complaint asked the District Court to restrain the Pennsylvania and BRT from continuing the discharge or suspension of respondent and his fellow trainmen employees until they had been given an opportunity for reinstatement to membership in the BRT under the same terms or conditions available to other members and from enforcing the Union Shop Agreement to terminate their employment (R. 8-9). The complaint alleges, among other things, that the Union Shop

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Agreement between the Pennsylvania and the BRT was in conflict with the Railway Labor Act and therefore invalid for the following reasons, among others:

(1). The Union Shop Agreement does not provide for a System Board of Adjustment in Union Shop Agreements to determine complaints initiated by the Union against an employee (R. 7);

(2). Section 3, Second, of the Railway Labor Act authorizes System Boards for the purpose of hearing only disputes between an employee and carrier and not disputes between bargaining representatives and the employees (R. 7);

(3). The Agreement permits the representative of the BRT to sit in judgment on the BRT's complaint against the employees (R. 8);

(4). The Agreement attempts to make the decision of the ~~Board final~~ without any right to appeal or review (R. 8).

The District Court, on petitioners' motions, dismissed the complaint for failure to state a cause of action (R. 34-36). The District Court held that it had jurisdiction to review decisions of a System Board of Adjustment, but that judicial inquiry is at an end once it is determined (1) that the Board's procedure and the award conforms substantially to the Statute and Agreement; (2) that the award confines itself to the letter of submission; (3) that the award was not arrived at by fraud or corruption (R. 29). The District Court further held that the fact the Agreement between the BRT and the Pennsylvania provides for a System Board consisting of two representatives of the Railroad and two from the Union does not, *per se*, make such an agreement invalid (R. 30).

The Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the case for trial on the merits (229 F. 2d 171; R. 39-44). The Court held that the System Board of Adjustment had jurisdiction over the matter because it was a dispute between the carrier and its employees (R. 41). The Court also unanimously held that the presence of the BRT labor members on the Board required that there be impartial review of the decision and since there was no administrative board which could provide this, there must be judicial review (R. 43). The Court further held that Section 3, First (f) was not an adequate alternative remedy because such procedure might not necessarily determine whether UROC was "national in scope," and that, in any event, it was not available to the employee, but only to UROC (R. 43).

### **Summary of Argument.**

1. Judicial review from the decision of the System Board is required because two of its four members were officers of the petitioner union which instituted and prosecuted the charges against the respondent employees. The opposing briefs contend that, despite this, there should not be judicial review in this case.

a. The contention of the Pennsylvania that because of the alleged general immunity of Railway Labor disputes from Court surveillance, the System Board must be presumed to be unbiased is untenable when, on the contrary, it is obviously biased and because under it due process requirements would have no application in the railway labor field. This Court has frequently held, and as the Court below stated, the requirement of a fair and impartial hearing transcends the general immunity of railway labor disputes from judicial review.



b. The BRT contention that Congress exhibited a "trust" in the men serving on railway labor boards is also without merit because the interest to perpetuate their own organization permeates the decision these men are in a position to render.

2. The decision of the Court below does not make review of System Board action inevitable. Only where the union "aggressively" prosecutes its claims against nonmembers and has a vital interest in the outcome is the decision subject to court review. Under this situation, remand cannot be made to any board because the Union Shop Agreement requires two union members to be on such board.

3. Section 3, First (f) does not apply. The Union Shop Amendment by its express terms confers on the employee the right to retain his job if he belongs to an alternative union national in scope. Section 3, First (f) provides a procedure whereby a union can place a representative on the Adjustment Board. By the plain meaning of the statute and from the Congressional debate Congress did not intend to incorporate the technical provisions of Section 3, First (f) into the Union Shop Amendment.

a. To be adequate a remedy must obviously be available and necessarily determine the issue. The Court below correctly held that Section 3, First (f) fulfills neither requirement.

b. To refute the unanimous holding of the Court below, the opposition argues that the right to determine "national in scope" status under the exception to the Union Shop requirement, is granted by Congress exclusively to the competing union; that the exclusive way a union can establish its status for union shop purposes is to qualify under Section 3, First (f), and that, therefore, any bias

of the System Board was immaterial because it had no discretion to arrive at an independent conclusion. All this is read into the Act without authority, and contrary to established law.

(1). The law is established that in "minor disputes," as the one involved herein, rights granted by Section 2 of the Railway Labor Act are conferred on the employee and not on his union.

(2). Section 3, First (f) is limited to the union's placing a representative on the Adjustment Board, and is not, as contended, the exclusive manner in which "national in scope" status can be obtained. For example, Railroad Retirement regulations, rebutting this contention of the opposition, have been part of the public record since 1937, and Congress must be presumed to have knowledge of them.

(3). Therefore, there was discretion in the System Board to act and judicial review is necessary.

c. Even assuming the opposing contentions, judicial review is, nevertheless, necessary. Before Section 3, First (f) can be invoked, the participating unions must certify a dispute. They have avoided this prerequisite certification in the past, and are currently avoiding this as to UROC. Thus, because of such evasion, the Section cannot be a cure for due process deficiencies at the System Board level, for the application of the Section is also within the control of the "standard unions."

4. The opposition support their contentions by claiming judicial review will bring, in effect, chaos and confusion in the industry. They overlook that the Court below found judicial review necessary because petitioners failed to set up an impartial board to administer their Union Shop Agreement. They further disregard that if this Court

adopts their arguments the "standard unions" will be so entrenched as to prevent new, competing organizations. Congress certainly never intended this result in passing the Union Shop Amendment. Congress is presumed to have adopted the prior definition of "national in scope" of the Secretary of Labor. This definition, in substance, is that to be "national in scope," a union must represent employees of different companies rather than be organized within a single company or carrier, and have more or less general dissemination throughout the country shown by such criteria as geographical area of representation, number of employees represented, number of agreements, number of carriers with whom agreements are held, and mileage of such carriers. With this definite guide for court review, chaos and confusion cannot arise.

# I.

**The award of the System Board of Adjustment is in violation of due process and reviewable by a Court because the Board could not and did not give the respondent, and his fellow employees, a fair and impartial hearing.**

The BRT cited the respondents for non-compliance with the Union Shop Agreement. At the hearing before the System Board, the BRT prosecuted the charge. Two officials of the BRT sat on the four-man System Board which sustained the BRT charge of non-compliance, and held that the competing union, UROC, to which respondents belonged, was not "national in scope."

The Court below unanimously condemned this procedure as completely defeating the most elementary requirements of fair play. Nothing, said the Court below,

would more firmly entrench the recognized unions in power.<sup>1</sup> Even the Sixth Circuit in *Pigott, et al., v. Detroit T.I.R.R. Co.* 221 F. 2d 36, affirming 116 F. Supp. 949, recognized that this procedure was inherently unfair. Thus the District Court's opinion, approved by a divided Court, which was unanimous on this point, stated:

"Because of the conflict of interests between the established unions and a 'new' union, the National Railroad Adjustment Board is not a competent agency to review the qualifications of such a labor organization. With half of its members selected by the established unions, it is not likely that they would regard with equanimity the claim of a 'new' union, a rival to one or more of the members' organizations. This pressure to protect a vested interest would be even greater were the matter to be heard by a system board of the type before which the plaintiffs appeared in the instant case. That board, as has been stated, was made up of one representative of the Railroad and one representative of the Brotherhood" (p. 954).

Both Courts are thus agreed that the procedure is unfair. The disagreement between the two Courts of Appeals is whether Section 3, First (f), is an adequate alternative remedy for this.<sup>2</sup>

Despite the wide application of this basic principle to

<sup>1</sup>R. 43.

<sup>2</sup> The District Court's interpretation of Section 3, First (f) which is adopted by the three *amici curiae* briefs will be discussed, *infra*.

administrative boards as well as to courts,<sup>3</sup> the petitioners contend it does not apply in the Railroad labor field whether or not Section 3, First (f), is involved in the case.

To circumvent this principle of law, so firmly established that Judge Hand did not cite case law for it, the Pennsylvania contends that it should be ignored and there should not be judicial review of the decision of the System Board of Adjustment (pp. 10-37). It urges the somewhat remarkable conclusion that the Board must be presumed to be unbiased, even though on the contrary, bias is obvious. Thus, Pennsylvania somewhat strangely contends that the public interest in the impartial protection of rights granted by an Act of Congress is transcended by the supposed general immunity of railway labor disputes from all surveillance or review by a Court of law. We agree that the cases cited by the Pennsylvania stand for the proposition that *normally* Courts will not review decisions of System Boards on the merits. But, here

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<sup>3</sup> *Tumey v. Ohio*, 273 U. S. 510, 522 (applied the principle to hold unconstitutional an Ohio Statute which provided that an inferior court judge was to be paid for his services only after conviction); *People v. Naimark*, 154 App. Div. 760, 763, 130 N. Y. S. 418, 420 (new trial granted because remarks of judge in passing sentence showed he had prejudged the case). Orders of the National Labor Relations Board have been vacated in the following cases because of partiality. *NLRB v. Ford Motor Co.*, 114 F. 2d 905, 909 (C. A. 6); *Inland Steel Co. v. NLRB*, 109 F. 2d 9, 20; *NLRB v. Phelps*, 136 F. 2d 562, 563 (C. A. 5) (collates past decisions in Footnote 1, page 563 and holds that if anything, this principle is more essential in administrative decisions). *Texas Electric Service Co. v. City of Seymour*, 54 F. 2d 97, 98 (D. C. Tex.) applied the principle to avoid a minimum rate set by a city council to encourage consumers to use the municipal plant. This Court recently held that it was a violation of due process for a judge to try a witness for contempt committed before him when acting as a one-man grand jury. This Court stated: *In Re Murchison*, 349 U. S. 133: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in a trial of cases. But our system of law has always endeavored to prevent the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome" (p. 136).



we do not have the normal situation where both parties are equally represented on a bipartisan board. Here we have the exception, where only one of the parties is so represented, and, therefore, judicial review is essential to protect the rights of the other party.

*Edwards v. Capital Airlines, Inc.* (C. A. D. C.), 176 F. 2d 754, cert. den. 338 U. S. 885 (1949), followed by the Court below in reaching its decision, reviewed the decision of the System Board on the merits in a similar situation.

*Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907 (D. C. Wash., 1953), cited by Pennsylvania (p. 15) in support of its contention of no review, carefully distinguished the *Edwards* case, *supra*. Thus the Court stated in footnote "6" to its opinion:

"In *Edwards v. Capital Airlines*, 1949, 84 U. S. App. D. C. 346, 176 F. 2d 755, the court reviewed the award of a System Board of Adjustment on the merits. In that case, however, plaintiff was a co-pilot who brought his grievance before a board, the labor members of which were pilots and members of a union which opposed plaintiff's claim. The court made it clear that it subjected the award to such broad review precisely because plaintiff was not properly represented before the board" (p. 909). (Italics supplied.)

In *Bower v. Eastern Airlines, Inc.*, 214 F. 2d 623 (C. A. 3), cert. den. 348 U. S. 871 (1954), where plaintiff sued for damages for wrongful discharge after a claim for reinstatement had been denied by the System Board of Adjustment established under Section 204, Title II, of the Railway Labor Act,<sup>4</sup> the Court specifically reviewed the question whether the Board gave plaintiff a full and

<sup>4</sup> Title II deals with airlines and is summarized in Pennsylvania brief page 15.

fair hearing and exercised honest judgment in reaching a decision on the full record. There the Court found that it did. Here the Court below correctly held it could not because of its composition.

Pennsylvania attempts to distinguish the *Edwards* case, *supra*, on two grounds. First, it claims that the Court was probably influenced by the fact that the dispute involved the seniority rights of veterans returning from military service. That is erroneous. The Court in summarizing its position uses language appropriate to the instant case and emphasizes the right to judicial review on the merits from the System Board decision:

"The situation can be summarized in simple terms. All employees of a company have rights under a contract. A dispute arises between a few employees and a great majority of employees concerning the rights of the few. The claims of the few are adverse to the interests of the majority. The company has no actual concern in the controversy one way or the other. The dispute goes for decision to a tribunal composed of two representatives of the company and two representatives of the union of the employees. The union assumes representation of the claims of the majority. The contract provides that the decision of this tribunal shall be final and binding. It also happens that the few employees are non-members of the union. The question is: Can the 'final and binding' clause of the contract prevent the few employees (non-members of the union) from securing a judicial review of an adverse award made under this combination of circumstances? We must conclude and we do, that it cannot. These appellants, in our view, had standing to bring these actions and the court was required by their complaint to examine the validity of the award against them. Persons in their situation must have available to them, at some point, an impartial look at a decision, thus made, denying their

claims to substantial rights. This is the time-honored function of an equity court" (p. 761).

Second, Pennsylvania points out (p. 20) that the decision in the *Edwards* case, *supra*, preceded this Court's decision in *Slocum v. D. L. W. R. R. Co.*, 339 U. S. 239 (1950). The *Slocum* case, *supra*, specifically excluded a case like the one at bar from the basic assumption which Pennsylvania advances. This Court stated in footnote 7:

"We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 89 L. ed. 173, 65 S. Ct. 226. Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction" (p. 244).

Mr. Justice Reed, of this Court, commented on this footnote in his dissent at pages 245-246:

"The Court, however, in note 7 states that it is not called upon to decide any question concerning judicial proceedings to review board action or inaction.' From this I take it that the Court means only to hold the Board has what might be called exclusive primary jurisdiction and that the decision is to have no implications for later cases which might pose the issue of judicial review of Board 'action or inaction.'"

Thus, Pennsylvania's reliance on the *Slocum* case, *supra*, throughout the first sections of its brief to support the argument that Railway Labor disputes are beyond the jurisdiction of the Courts except in enforcement proceedings is without substance. The Court in the *Farris* case, *supra*, decided after the *Slocum* case, *supra*, had no difficulty in recognizing the distinction drawn in the *Edwards* case, *supra*, expressed in the above quoted footnote from that Court's opinion.

The BRT brief (pp. 16-18) uses a different argument for the conclusion that the three learned Judges below were in error in unanimously holding reviewable the decision of the System Board of Adjustment because of the obvious bias of the labor members sitting on the Board. It argues that Congress apparently had sufficient faith in the honesty, integrity and objectivity of union official representatives called to serve in a dual capacity on these Boards, to sanction their acting also as Board members and to fortify their decisions with final and binding effect. The BRT argues from this, that Courts should not lightly overrule this "trust" that Congress has thus exhibited. Considering BRT's contention that Congress intended that the System Board have jurisdiction over disputes like that in the present case, this is fully answered by *Texas Electric Service Co. v. City of Seymour*, 54 F.2d 24, where the Court said:<sup>5</sup>

"Those who compose the Seymour city council were unquestionably men of integrity, *but they were men*" (p. 96). (Italics supplied.)

The decision of the Court below is not at "war" with the whole pattern of the Railway Labor Act as alleged in the Brotherhood brief. On the contrary, the arguments advanced by the petitioners that the presence of the labor members on the System Board whose union instigated and prosecuted the charges against the respondents did not, *per se*, make the awards invalid, if not reviewable, by some tribunal or it is at "war" with the basic proposition of American jurisprudence recognized by both the Court below and the Court in the *Pigott* case.

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<sup>5</sup> The facts of this case are summarized in footnote 3, *supra*.



## II.

**The decision of the Court below does not make inevitable court review of System Board decisions.**

Both petitioners seek to broaden the decision of the Court below by claiming that its logical result is to make judicial review available to any employee who loses before a System Board solely because labor representatives sit on the Board and participate in the decision. This contention disregards the distinction expressed in the *Farris* case, *supra*. The Court below correctly held there must be review from the decision of such a Board where half of it is composed of members of the same union which cited and prosecuted the charges against the employee, and where the same half of the Board belonged to the very organization which is most vitally interested in having a rival organization declared not to be "national in scope."

The Court below could not limit its decision to setting aside the Board's award and remanding the dispute for further disposition under the procedure of the Railway Labor Act, as suggested on page 21 of Pennsylvania's brief, for the very simple reason that the only Board to hear the dispute further would be a Board similarly constituted and biased. This vital fact distinguishes the present case and the *Edwards* case, *supra*, from the *Farris* and *Bower* cases, *supra*, and the other cases cited in Pennsylvania's brief (pp. 15-16). In other words, as the BRT brief describes it (p. 13), where the union "aggressively" presses its claims against nonmembers, there must be review on the merits by a Court because there is no Board validly established by the carrier and union under the provisions of the Railway Labor Act which can give the nonmembers a fair and impartial hearing.



Because of this self-interest, respondent urged before the lower Court that Congress never intended that System Boards have jurisdiction in these disputes. Section 3, Second of the Act, Title 45 U. S. C. A., Section 153, Second, is the authority for the establishment of System Boards of Adjustment, whose jurisdiction is limited to the same type of disputes which the National Railroad Adjustment Board is empowered to hear.

Therefore, to determine the jurisdiction of the System Boards of Adjustment, the jurisdiction of the National Railroad Adjustment Board must first be examined. Section 3, First of the Act, 45 U. S. C., confers on the National Railroad Adjustment Board jurisdiction only over disputes between carriers and their employees.

Who are the disputants? For the sake of expediency. Pennsylvania contended before the lower Court that the dispute was between it and its employees in order to sustain the jurisdiction of the System Board to act in the first instance. But, who is the real party in interest? Who stands to gain or lose by the decision? Who initiated and prosecuted these charges? Certainly, it is not the Pennsylvania, but the BRT. *Hargrove v. Brotherhood of Locomotive Engineers*, 116 F. Supp. 3, confirms that the mere fact that the Pennsylvania fired these men does not make it the real party in interest. In that case, plaintiff had been employed in the operation of the Government-owned railroad on the Oak Ridge Reservation, which was subsequently taken over by the Louisville and Nashville Railroad. The bargaining agreement negotiated by the Brotherhood and the Railroad cancelled or ignored certain seniority rights of the plaintiffs, and as a result they were discharged. The Court stated:

“Looking first to its language (Railway Labor Act), it will be noted that it (Administrative Board

created under the Railway Labor Act) is confined to 'disputes between \* \* \* employees and a carrier.' This dispute in its present posture is not one between employees and a carrier, but between members of labor unions and their unions" (p. 6).

Under the above, the award of the System Board is invalid and of no effect since a System Board could not be established to hear the instant dispute between the employees and their bargaining representative.

The Court below rejected this proposition and held the dispute was between the carrier and its employees.<sup>6</sup>

Since the Court below held that the System Board had primary jurisdiction, then, unless the Act is to be declared unconstitutional there must be impartial or judicial review. As previously pointed out, there cannot be a remand to some Board created by the parties under the Act since no impartial Board is possible under the present bargaining agreements. Therefore, unless the Act itself furnishes an "adequate remedy" there must be Court review.<sup>7</sup>

<sup>6</sup> Contrary to the assertion on page 23 of Pennsylvania's brief, the Court below did not reject previous so-called UROC cases, cited on page 22 of the Pennsylvania brief, with the exception of the *Pigott* case, *supra*, in reaching its decision. All that these cases held was that the System Board had "primary jurisdiction" of such disputes. That these Courts did not intend to foreclose judicial review on the merits after the System Board had acted is clearly shown from the following illustrative quote from *Johns v. Baltimore and Ohio R. Co.*, 118 F. Supp. 317, at 321, *aff'd per curiam* 347 U. S. 964, where the three-judge Court said the dispute was: "\* \* \* cognizable by the Board, and that should put an end to the jurisdiction of this court until plaintiff has there sought his remedy." (Italics supplied.)

<sup>7</sup> The above applies to the contentions advanced by the petitioners. The position adopted by the three *amici curiae* briefs will be discussed *infra*. Point III. See comment, 18 University of Chicago Law Review 303 (1950), for an informative discussion on the manner in which representatives on the National Railroad Adjustment Board are motivated by partisanship.

## III.

**Section 3, first (f), is not an adequate remedy for the obvious bias of the System Board or the exclusive manner in which "national in scope" status may be obtained.**

The BRT brief argues in the alternative that either the procedure under Section 3, First (f) is an adequate remedy for any bias of the System Board, or that it is the exclusive method for determining "national in scope" status so that any bias is immaterial.<sup>8</sup> The striking fact about these alternative arguments is that they are mutually exclusive. In other words, the argument that this Section is an adequate remedy for bias of the System Board is based on the assumption that the System Board has discretion to act.<sup>9</sup> The alternative contention, on its face, denies that there is discretion in the System Board, and is based on the premise that Section 3, First (f) is the exclusive manner in which "national in scope" status can be defined.

Section 3 of the Act (App. A., p. 3a) is entitled "National Railroad Adjustment Board \* \* \* Establishment; composition; powers and duties; divisions; hearings and awards." It appropriately deals with the typical questions involved in the establishment, composition

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<sup>8</sup> The Pennsylvania brief relies mainly on the first of these alternative arguments, while the Government brief dedicates itself exclusively to the second.

<sup>9</sup> As will be shown, *infra*, this is the view that, with the possible exception of the District Court in the *Pigott* case, *supra*, has been generally adopted in this field of law.

and jurisdiction of the National Railroad Adjustment Board.

Subdivision (a) of Section 3, First (App. A., p. 3a) provides that one-half of the members of the National Railroad Adjustment Board shall be selected by "such labor organizations of the employees, national in scope, as have been *or may be organized* in accordance with the provisions of Section 2 of this Act."<sup>10</sup>

Section 3, First (f) (App. A., p. 4a) provides that if a dispute exists as to the right of any national labor organization to participate in the selection of members of the Adjustment Board, then the Secretary of Labor shall first investigate the claim, and, if he decides it "has merit" he shall notify the Mediation Board. That Board will then ask those unions already qualified as electors to select one of their members to serve upon a three-man Board, the applicant itself will select another member and the Mediation Board will select a third or so-called neutral member to pass upon the dispute.

Thus, Section 3, First (f) provides a three-step procedure for a "new" union to become qualified to participate in the selection of labor members to the Adjustment Board. First, such new union must obtain a certification that a "dispute" exists between it and the qualified organizations; second, the Secretary of Labor must investigate the "new" union's claim for a seat on the Adjustment Board and decide if it has merit; and third, if the Secretary of Labor finds that a dispute exists and there is "merit" to its claim, the three-man Board is chosen to

<sup>10</sup> As the above emphasized language shows it is clear that Congress contemplated new unions may become qualified to participate in the selection of Adjustment Board members. As will be shown, *infra*, the interpretation of Section 3 advanced by all the opposing briefs, makes this a practical impossibility.

pass on the application.<sup>11</sup> The Court below and the Court of Appeals in the *Pigott* case, *supra*, are agreed that if the above procedure of Section 3, First (f) fails to provide an adequate remedy for the bias of the System Board or remove discretion from the System Board to arrive at a decision of its own on the merits, then the determination of the System Board must be invalid.<sup>12</sup>

### A.

**Section 3, First (f), is not an adequate remedy for the violation of due process inherent in the composition of the System Board.**

The first argument of the petitioners is that Section 3 is an adequate remedy for any bias of the System Board. The Court below held it was not. It is obvious that before a remedy can be examined to see if it is adequate two things must first be determined. First, is it available? Second, will it necessarily determine the issue? The Court below decided in the negative on both of these preliminary determinations.

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<sup>11</sup> U. S. Dept. of Labor, Decisions of the Secretary, in the *Matter of United Transport Service Employees of America* (Jan. 2, 1947); *Brotherhood of Sleeping Car Porters* (Sept. 8, 1948); *American Railway Supervisors Association, Inc.* (Sept. 8, 1953) (all set forth in appendices pp. 10a-33a). These decisions show that the procedure is in fact a three-step procedure, and not a two-step procedure as outlined in all opposition briefs in that, the Secretary of Labor must certify a dispute before he can act further.

<sup>12</sup> See the quoted portion from District Court's opinion in the *Pigott* case, *supra*, p. 11. The Government brief also tacitly adopts this view on page 7 where it states: "If it is assumed that such a 'right' exists, the only issue is whether the administrative procedures of Section 3 provide an employee with a proper tribunal for determining if his alternative union, in fact, meets these requirements."



First, the Court said that the remedy was not adequate because it did not necessarily determine the issue.<sup>13</sup> Section 3, First (a) of the Railway Labor Act provides that one-half of the members of the National Railroad Adjustment Board shall be selected "by such labor organizations of the employees, *national in scope*, as have been or *may be organized* in accordance with the provisions of Section 2 of this Act." (Italics supplied.) Section 3, First (f) provides that the Board of three shall decide whether the union "was organized in accordance with section 2 hereof and is *otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board.*" (Italics supplied.) All five opposing briefs argue that the phrase "otherwise properly qualified to participate in the selection of labor members of the Adjustment Board" in Section 3, First (f) is equal in meaning to the words "national in scope" used in Section 3, First (a).

The obvious answer to this interpretation is: why did Congress use the expanded phraseology instead of simply repeating the words "national in scope"? Reading Section 3 as a whole provides the answer. Section 3 requires that the Secretary of Labor first pass on the merits of the claim. In doing so the Secretary must make a determination on the merits of the "national in scope" status.<sup>14</sup> The Secretary has defined the phrase by refer-

<sup>13</sup> Justice Hand in reaching this conclusion stated: "\* \* \* when a union applies to be chosen as an elector there are other conditions that it must satisfy besides being 'national in scope': i. e., it must be 'organized in accordance with' the Act, and it must be 'otherwise properly qualified to participate in the selection of the labor members' of the National Board (Sec. 153, First [f]). The 'board of three' may of course make a specific finding that the applicant union is not 'national in scope,' as the ground of refusing to admit it as an elector; but if it fails to do so, it will be impossible to know whether this was in fact its ground for refusal; and a proceeding that may leave this issue undecided can hardly be intended as a remedy for any bias of the 'System Board'" (R. 42-43).

<sup>14</sup> See footnote 11, *supra*.

ring to its legislative history which shows that the term was used to "differentiate between the union organized within a single company or carrier and those representing employees of different companies."<sup>15</sup> He added other criteria such as the geographical area in which the claimant's representation extends, the number of employees represented, the number of agreements, the number of carriers with whom agreements are held, and the mileage of such carriers (p. 11 of the Secretary's decision, quoted in note 11, *supra*). The Secretary referred to these other criteria because they were "relevant by virtue of the plain and unambiguous language of the Statute" (p. 11, *supra*). The Secretary, in making his definition, followed the decision in *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U. S. 322, where this Court stated concerning the term "national or international labor organization":

"If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition" (p. 324).<sup>16</sup>

Why then with the Secretary of Labor known to be so intensively investigating the issue of "national in scope"

<sup>15</sup> U. S. Dept. of Labor, Decisions of the Secretary in the *Matter of the American Railway Supervisors Association, Inc.* (Sept. 8, 1953) (set forth in App. D, p. 22a). Page 9, Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Congress, 2nd Session (1934), p. 19156.

<sup>16</sup> The Secretary of Labor's inclusion of these other criteria in the determination of "national in scope" also appears to be justified by the following colloquy, at the time the 1934 Amendments were under consideration, at pp. 12-13 of the Hearings before the Committee on Rules, House of Representatives, 73rd Cong., 2d Ses. on H.R. 9841 (1934): "Mr. O'Connor: They could not be national in scope if they were members of a union made up of employees of some little railroad entirely in one State. Where would the national in scope come in?" "Mr. Crosser (Congressman from Ohio and sponsor of the bill): I say, if they did not have more or less of a general dissemination of their membership throughout the country, they would not be national." (Italics and bracketed material supplied.)

did Congress set up the "three-man Board"? The answer is in the expanded statutory language "otherwise properly qualified to participate in the selection of labor members of the Adjustment Board. . . ." In other words, Congress must have concluded that while an organization might be "national in scope": i. e., might not be a company union and might be "more or less widely disseminated throughout the country," it might not have sufficient stature to be "otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board . . . ." Thus, the Court below correctly held that " . . . a proceeding that leaves this issue (national in scope) undecided can hardly be intended as a remedy for any bias of the 'System Board' " (parenthetical material supplied). The Court's interpretation is directly in line with the many decisions of this Court holding that where the words of a statute are plain, the Court is not at liberty to add additional and qualifying terms.<sup>17</sup> What petitioners are seeking to do is aptly described by Mr. Justice Frankfurter of this Court in *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, when he stated in discussing the term "assumption of risk":

"A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminatingly used to express different and sometimes<sup>18</sup> contradictory ideas" (p. 68).

The second reason given by the Court below for its holding that Section 3, First (f) was not an adequate remedy for the bias of the Board was that the remedy was not available to the employee but only to his labor

<sup>17</sup> e. g., *Osaka Shosen Line v. United States*, 300 U. S. 98, 101.

<sup>18</sup> The Pennsylvania brief quotes the phrase "otherwise properly qualified" as "likewise properly qualified" in the Appendix to its brief (p. 53) and in the petition for the writ (p. 23a). Were this typographical error the correct language of the statute, the petitioner's contention might have more merit.

union, over which he, as an individual, had no control. The Court further reasoned that even if the employee could force the union to exhaust the remedy, there was no reason why he must be compelled to accept the union as the surrogate of his rights.<sup>19</sup> The lower Court's holding that the statutory rights belong to the employee is indeed unanswerable without doing violence to established principles pertaining to exhaustion of remedies. In rebuttal, petitioners are forced to argue that the individual employee is given no right to avoid his union shop membership requirements by belonging to an alternative union, and that the right created in subsection (c) is conferred exclusively on the qualified operating union itself.<sup>20</sup> To reach this conclusion, petitioners do violence to the express language of the statute, previous decisions of this and other Courts, including the opinion of the Court of Appeals in the *Pigott* case, *supra*, and change their own previously expressed position.

The Brotherhoods, the Railway Executives Association, and the Government argue in substance as follows:

1. The individual employee is given no right by this Statute to continue working if he belongs to a competing organization in fact "national in scope."

2. The exception contained in Section 2 Eleventh (c) (the "national in scope" exception to the Union Shop requirement) is a "right" conferred exclusively on the so-called qualified operating unions themselves.

3. Whatever the status of a competing union may be in fact, it is not "national in scope" as a matter of law un-

<sup>19</sup> Record, p. 43.

<sup>20</sup> The three *amici curiae* briefs concern themselves only with this question, and on this ground come to an opposite conclusion than that reached by the Court below. The Pennsylvania brief, on the other hand, does not interpret the statute in this manner.

less and until it has qualified under Section 3, First (f) and participates in the selection of Adjustment Board members.

4. Therefore, there is no discretion in the System Board thus disposing of questions of remedy and jurisdiction.

If any one of the first three points is not well taken, the concluding point "4" in this syllogism falls with the entire argument. This argument goes in a circle for either all these contentions stand or all fall together. If the right is in the employee the issue becomes the adequacy of Section 3, First (f).<sup>21</sup> If the right is not conferred on the so-called qualified operating unions, then Section 3 does not apply because it is something that only the union can accomplish and over which the employee has no control. If Section 3, First (f) is not the exclusive way in which a union can be determined to be "national in scope" then there is discretion in the System Board. Finally, if there is discretion in the System Board, the question of bias is squarely presented again.

#### B.

**The rights are conferred on the employee individually and not upon his bargaining representative.**

Section 2, Eleventh (c) confers on the employee the right to keep his job if he belongs to a competing union "national in scope." This section states:

"The requirement of membership in a labor organization in an agreement made pursuant to subparagraphs (a) of this paragraph shall be satisfied, as to (operating employees) . . . if said employee shall hold or acquire membership in any

<sup>21</sup> P. 7 of the Government brief.



one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services \* \* \*." (Italics supplied.)

Thus, the Statute, by express terms, confers this right upon the employee, and not upon his labor organization. The Government calls the above language "expanded" and concedes (p. 8):

"If subsection (c) stated simply that the requirement of membership shall be satisfied by membership in 'any other labor organization national in scope,' the plain meaning of such language might require the interpretation placed on it by the Court below."

But if Congress intended to incorporate the highly technical provisions of Section 3 into Section 2, which this Court has held grants individual rights to the employees and not to their bargaining representatives, *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, why did not Congress simply say that the requirement of membership shall be satisfied by membership in "any labor organization qualified under Section 3, First (f)."<sup>22</sup> Congress, did not do so, although in passing the Union Shop Amendment, it took pains to amend Section 2, Fourth, and Section 2, Fifth, of the Act in order to make them consistent with the Union Shop provisions of Section 2, Eleventh, and specifically referred to subsection 3 First (h). (App. A., p. 5a.) As Judge Allen stated in the dissenting opinion in the *Pigott* case, *supra*:

"To apply the technical administrative provisions of Section 153, First, relating to unions and management, to the simple but all important guar-

<sup>22</sup> Serious constitutional questions would arise if Congress had used this language in view of the fact that minority rights would be unprotected since the qualified organizations must certify a "dispute" to the Secretary of Labor.

anties of Section 152, Eleventh, on behalf of the employee, nullifies the Congressional intent and constitutes judicial legislation.

"The question here is not how the National Railroad Adjustment Board shall be constituted nor whether the appellee union shall have a representative on the National Railroad Adjustment Board which is the general subject of Section 153, First. The question here is whether appellants shall be deprived of their livelihood. Their right not to be deprived of it if U.R.O.C. comes within the classification of Section 152, Eleventh (c) is a valid statutory right falling within the general jurisdiction of the federal court under title 28, Section 1331. The case certainly arises under a law of the United States. It is a right which should be protected by the examination of a court free from bias or conflict in interest and safeguarded by judicial procedure" (p. 743).

There is a simpler explanation for the "expanded language." Through the use of this language, Congress intended to incorporate the previous definition of the Secretary of Labor into Section 2, Eleventh (c).<sup>23</sup> The language used in Section 2, Eleventh (c), as the opposition briefs point out, is the same as the language used in Section 3, First (a) which was specifically construed by the Secretary of Labor. Thus, in accordance with recognized canons of construction, Congress must have intended to adopt the definition and construction of the Secretary of Labor.<sup>24</sup> This is especially confirmed because Congress made no other definition of its own. Further, this interpretation is consistent with Congressional use of "other-

<sup>23</sup> Two of the decisions of the Secretary were made before Section 2, Eleventh (c) was added to the Act. See footnote 6, *supra*.

<sup>24</sup> *I. C. C. v. Parker*, 326 U. S. 60 *cf.* *Copper Queen and Consol. Mining Co. v. Territorial Board of Equalization of Arizona*, 206 U. S. 474; *Greenleaf v. Goodrich*, 101 U. S. 278; *National Lead Co. v. United States*, 252 U. S. 140; *U. S. Dakota-Montana Oil Co.*, 288 U. S. 454.

wise properly qualified," in Section 3, First (f). This language, which the opposing briefs strive so hard to equate with "national in scope," used in Section 3, First (a), refers only to the three-man Board determination and not to the Secretary of Labor. Thus, Congress did not intend to incorporate technical provisions of Section 3, First (f) into Section 2; but rather, to incorporate the definition of the Secretary of Labor, of which Congress is presumed to have knowledge and advice.<sup>25</sup> In addition this interpretation gives full meaning to the word "national" used in the beginning of Section 3 First (f). The section starts:

"In the event a dispute arises as to the right of any national labor organization to participate \* \* \*

In other words, in order to invoke the procedure under Section 3 First (f) an organization must be a "national" one, and the Secretary of Labor determines whether it is national and whether there is merit to its claim to participate.

Significantly, none of the other briefs join in the Government's argument of "expanded language." Instead, their arguments are addressed mainly to the assumption that Congress must have intended that the employees should have no individual rights because of the supposed

<sup>25</sup> In 1 *Sutherland on Statutory Construction*, 3rd edition, Section 1933, pp. 428-429 (1943), it is said: " \* \* the legislature is presumed to know the prior construction of the original act, and if words or provisions in the act or section amended that had been previously construed are repeated in the amendment, it is held that the legislature adopted the prior construction of the word or provision." See also Section 1935, pp. 432-433 (cited on p. 26 of the B. L. E.).

And in Vol. 2, Section 5109 pp. 423-524 it is said: "Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment."

consequences flowing therefrom.<sup>26</sup> But, even assuming, without conceding, that the qualified organizations are correct in what they deem to be the dire consequences of the lower Court's decision, this very argument was rejected by this Court in the *Elgin* case,<sup>27</sup> *supra*, on the theory that individual rights were more significant.<sup>28</sup> The Court below came to the same conclusion in the present case (R. 44).

The *Elgin* case, *supra*, involved the question whether the individual employee had the right to settle his own grievances, or whether the collective bargaining agent had exclusive authority to settle them. This Court drew a sharp distinction between "major disputes" and "minor disputes" under the Railway Labor Act. In the case of "major disputes": i. e., those involving major issues, such as certification of bargaining representatives, upon which strikes ordinarily arise and where the National Mediation Board is given jurisdiction to act, this Court stated exclusive rights were given by the Statute to the bargaining representative. But, in the case of "minor disputes": i. e., those which concern interpretation or application of bargaining agreements, the Court held that the rights conferred by the Statute were given to the employee. Thus, this Court held the employee had the individual right to settle his own grievances for two

<sup>26</sup> The responsibility of the qualified organizations for these supposed consequences and the extent of potential consequences if the participating organizations' interpretation were adopted will be discussed *infra*, under Point IV.

<sup>27</sup> See the dissenting opinion of Justice Frankfurter pp. 759-760.

<sup>28</sup> This Court stated the proposition as follows: "If, moreover, as petitioner urges, this may make the settlement less convenient than if power to deal with grievances were vested exclusively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amounting to more than mere protest in the settlement of claims arising out of his employment" (pp. 740-741).

reasons. First, the language of the Section (Section 2 of the Act) was cast in terms of individual rights. Second, this Court declared that a contrary holding would be against the policy of the Act because, among other things, minorities will be deprived of a voice affecting their very means of livelihood. Thus, this Court stated on pages 733-734:

"It would be difficult to believe that Congress intended \* \* \* to submerge wholly the individual and minority interests \* \* \*. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment \* \* \*. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims."

This Court further expanded on this in footnote 31 of page 734:

"\* \* \* Accordingly, the interests of unorganized workers and members of minority unions are concerned in the solution. These are not always adverse to the interests of the majority or of the designated union. But they may be so or even hostile \* \* \*. To regard the statute as so completely depriving persons thus situated of voice in affairs affecting their very means of livelihood would raise very serious questions."

The applicability of the *Elgin* case, *supra*, to the present case is apparent. Here, too, we have a "minor dispute" as that phrase is defined in the *Elgin* case, *supra*. The same reasons of the *Elgin* case apply for this Court to declare that in the present case Congress cast the



"national in scope" exception in terms of the employee's right.<sup>29</sup>

The BRT and the *amici curiae* are not helped in their position by the previous decisions involving UROC, including the majority and dissenting opinions in the Court of Appeals in the *Pigott* case, *supra*.<sup>30</sup> All of the previous cases dealing with members of UROC with the possible exception of the District Court opinion in the *Pigott* case, *supra*, have tacitly proceeded on the theory that the employee had the individual right to continue working if the competing organization to which he belonged was indeed "national in scope."

To sum up, on the basis of the plain meaning of the express language of the statute, the decision of this Court in the *Elgin* case, *supra*, and the previously mentioned UROC decisions, Congress granted individual rights to the employee and not collective rights to the bargaining representative, and therefore, Section 3, First (f) is not adequate because it is not available to the employee.

<sup>29</sup> This Court's distinction between "major" and "minor" disputes in the *Elgin* case, *supra*, also demonstrates that the attempted analogy which the Pennsylvania draws on p. 42 of its brief does not apply. Questions as to propriety of the certification of the bargaining representative are "major disputes" under the Act, which the employee would concededly have no right to challenge. See *Switchmen's Union of North America et al., v. National Mediation Board*, 320 U. S. 297.

<sup>30</sup> Cf. Government brief pp. 6-7. As to the "UROC cases" referred to see, for example, *United Railroad Operating Crafts v. Northern Pacific R. Co.*, 208 F. 2d 135 (CA 9); *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861 (CA 4); *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317 (N. D. Ill.) aff'd 347 U. S. 964; *Bohnen v. Baltimore & O. C. Term R. Co.*, 125 F. Supp. 463 (M. D. Ind.); *UROC v. Pennsylvania R. Co.*, 212 F. 2d 938 (CA 7).

**Section 3, First (f), is not the exclusive manner in which national in scope status can be obtained.**

Even assuming for argument only, that Congress vested the right in the union, the contention of no discretion does not apply unless this is an exclusive right and Section 3 is the exclusive way in which it can be determined that a union is "national in scope." The Courts and experts in the field are agreed that Section 3 is not such an exclusive remedy. This Court characterized the Railroad Yardmasters of America as a "national labor organization" despite the fact that it had failed to have a representative on any of the four divisions of the National Railroad Adjustment Board. In *Order of Railway Conductors v. Swan*, 329 U. S. 520, this Court first referred to the Order of Railway Conductors and the Brotherhood of Railroad Trainmen, both of which organizations had representatives on the National Railroad Adjustment Board as "national labor organizations" and stated:

"But that contention is contradicted by the Railroad Yardmasters of America, a *national labor organization* composed almost entirely of yardmasters and claiming to represent more than 70% of all the yardmasters in the country. That organization, \* \* \* has failed to place a representative on any of the four divisions." (Italics supplied.) (Pp. 522-523.)

Either the petitioning Brotherhood and the *amici curiae* impose a highly artificial and labored construction on the Railway Labor Act, or this Court used extremely loose language in characterizing the Railroad Yardmaster of America as a "national railroad organization" without

it having, at that time, a seat on the National Railroad Adjustment Board. In *UROC v. Pennsylvania R. Co.*, *supra*, the Court of Appeals (7th Cir.) specifically stated that Section 3, First (f) was not the exclusive manner in which "national in scope" status could be obtained. Thus, the Court stated on pages 942-943:

"It is evident from the provisions of the Act that only those labor organizations which are national in scope may participate in the selection of labor members of the Adjustment Board, though, of course, an organization could have such status without so participating." (Italics supplied.)

This decision was rendered after the District Court opinion in the *Pigott* case, *supra*.

As the petitioning BRT recognizes in the footnote on page 19 of its brief, the various Courts, with the possible exception of the District Court in the *Pigott* case, which have dealt with the "UROC cases" have agreed, that defining "national in scope" was a matter to be determined in the first instance by the National Railroad Adjustment Board or the various System Boards.<sup>31</sup> In other words, these Courts affirmatively held that there was discretion in the System Board to act, as in *Johns v. Baltimore & Ohio R. Co.*, 118 F. Supp. 317 at 321, where the three-Judge court said the dispute was:

"\* \* \* cognizable by the Board (the National Railroad Adjustment Board), and that should put an end to the jurisdiction of this court until plaintiff has *there sought his remedy*" (parenthetical material and italics supplied).<sup>32</sup>

That decision was affirmed, *per curiam*, by this Court in 347 U. S. 964.

<sup>31</sup> See footnote 28, *supra*.

<sup>32</sup> As the emphasized language shows, the Court also regarded the rights as belonging to the employee.

A Special Board of Adjustment set up under the provisions of the Union Shop Agreement between the Western Maryland Railroad and the BRT decided that the Railroad Industrial Union "was not a labor organization national in scope."<sup>33</sup> William M. Leiserson, the Referee designated by the National Mediation Board in that case and a well-recognized authority in the field, apparently did not consider that the exclusive method for determining "national in scope" status was Section 3, First (f) of the Act. On the contrary, he decided the case on the merits.

The phrase "national in scope" also appears in the Railroad Retirement Act of 1937, 45 U. S. C., Section 228a(a), and in the Railroad Unemployment Insurance Act, 45 U. S. C., Section 351(a), and is used to determine whether a railway labor organization is an "employer" under the terms of those Acts. Even there, where the exclusive right to qualify obviously belongs only to the railway labor organization, the Railroad Retirement Board has held that Section 153 First (f) is not the exclusive way in which "national in scope" status can be acquired. Thus the Board stated in *"In the Matter of the Status of The American Railway Supervisors Association, Inc., As An Employer Under the Railway Retirement Act and the Railroad Unemployment Insurance Act,"* Docket No. 29, July, 1952 (App. E, pp. 34a-46a):

"It will be noted that the Regulation (Federal Register, Vol. 4, p. 1480, April 7, 1939 [Sec. 202.15 of Regulations under Railroad Retirement Act of 1937]), recognizing that an organization doing business on or after June 21, 1934 (the enactment date of the Railway Labor Act, as amended), might actually be national in scope and organized in accordance with the provisions of the Railway Labor

<sup>33</sup> Opinion quoted in petitioner Brotherhood's August, 1952, "Circular of Instructions."

Act without having established a right to participate in the selection of labor members of the National Railroad Adjustment Board \* \* \* (App. E, p. 42a) (parenthetical material supplied)."

Finally, the contention that Section 3 is the sole way in which "national in scope" status may be obtained raises serious constitutional questions. First, the Act is silent on the rules which shall govern proceedings before the Board. This silence has not been cured by the issuance by any competent tribunal of any rules or regulations outlining procedure. Since the three-man Board has never been convened, there is no precedent to guide the applicant or the Board to be formed. In addition, the rules prescribed by one three-man Board would not necessarily be binding on any other three-man Board.

Second, if Congress set up the three-man Board as the sole arbitrator of "national in scope" status, the Act, under the doctrine of *Schechter v. United States*, 295 U. S. 495, and *Carter v. Carter Coal Co.*, 298 U. S. 238, would be invalid in this respect as a delegation of powers to a private, non-governmental body. Lastly, the Act would be unconstitutional on the important ground of violation of due process. This follows because Section 3, First (f) is also within the control of the participating and competing organizations.

As was previously pointed out, Section 3, First (f) is not a two, but a three-step process. Before the Secretary of Labor can inquire into the merits of whether a union is "national in scope" for the limited purpose of selecting members to the Adjustment Board, the participating organizations must certify a dispute exists. It thus becomes obvious that Section 3, First (f) cannot be

<sup>34</sup> The Association alleged that it had not qualified under Section B First (f) because the existing organizations had "no intention of ever giving \* \* \* a definite answer either one way or the other, as to the recognition \* \* \*."



an adequate remedy for bias at the System Board level, and also, that serious due process deficiencies would arise if this procedure were the exclusive way in which "national in scope" status could be obtained. The decisions rendered by the Secretary of Labor are very significant on these points. In *In the Matter of Brotherhood of Sleeping Car Porters* (App. C, p. 14a) it took the claimant organization over a year of fruitless correspondence and unanswered, repeated requests before the Secretary of Labor interceded on the ground that "the participating organizations seem to have carefully avoided taking a position on this matter" (App. C, p. 18a). In *In the Matter of the American Railway Supervisors' Association, Inc.* (App. D, p. 22a), the claimant organization spent two and a half years trying to get a "dispute" certified by the participating organizations before it was finally granted a hearing by the Secretary of Labor without such certification (App. D, pp. 25a-26a).

Thus, the application of Section 3, First (f) is in the control of the very organizations which have the most to lose if UROC is declared to be "national in scope," and if it must first obtain a seat on the Board. This is the very reason why the lower Court held the decision of the System Board to be invalid. Just how strong this control can be is illustrated by the following factual situation. Assume, that after considerable delay after request, the participating organizations grant the claimant organization a hearing at their next meeting set for some indefinite future time. Assume, that the hearing is finally held with the decision as to whether there is a "dispute" reserved to some future time. That such delaying procedures have taken place is shown by appendix F, pp. 47a-61a, which sets forth an account of what has happened to UROC's attempts to appear before the Secretary of Labor of which respondent asks the Court to take judicial notice.

An administrative remedy which is so greatly within the control of those who will benefit the most from delay, is certainly no adequate remedy for bias. It is also a violation of due process. Therefore, this Court should not agree with the contention that Section 3, First (f) is the exclusive manner in which "national in scope" status can be attained, for then the Act is either unconstitutional in this respect, or judicial review is inevitable.<sup>35</sup>

#### IV.

**"A balance of the equities" shows that the decision of the Court below should be affirmed.**

This is an Equity case, and therefore, it is very appropriate for this Court to "balance the conveniences" of the alternative equities. The opposition briefs enlarge supposed consequences of affirmance of the decision of the Court below. First, they contend that the general immunity of the Railway Industry from Court intervention will be invaded and perhaps destroyed. This theory is based upon the "State within a State" argument. See Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency* (1937), 46 Yale L. J. 567-569. Respondents are not quarreling with the general principle that the Courts should not interfere with Railway Labor disputes because, for certain purposes, Congress has set up a quasi-private government to handle them. But surely even the so-called "Railroad State"

<sup>35</sup> It is highly questionable that a Court could order the participating organizations, the Railway Labor Executives Association, or any other private group to certify a "dispute." The issuance of any extraordinary writ against the Secretary of Labor telling him to find a "dispute" would also be highly questionable since a Court would be substituting its discretion for that of the Secretary where Congress has chosen the Secretary to be the administrative officer in charge of administering that particular Section of the Act.

is subject to the same due process requirements common to the 48 States, as this Court has held.<sup>36</sup> The BRT's theory that Congress impressed a "trust" on Railway Labor Boards is no answer. This is not a question of integrity of the union men involved; the issue is rather, that they *are men* with human frailties.

Second, they contend that Section 3 is a "speedy, uniform, remedy applied by experts in the field." Even assuming for the sake of argument that obtaining a seat on the Adjustment Board is tantamount to being "national in scope," the alleged remedy is anything but "speedy," as shown by past history, confirmed by the fact that since 1934, the date of passage of the Act, a three-man Board has never been convened. The following is a summary of the apparent time schedule:

1. Application must be made to somebody to have a "dispute" certified.

2. Assuming that the Railway Labor Executives Association agrees it has authority to speak for the participating organizations (the B. L. E., a substantial union, is not a member of the organization) a meeting is indicated for some indefinite time in the future (see App. F, p. 61a; App. E, p. 38a).

3. Assuming that a meeting is held and the question discussed, a decision can be delayed for some time in the indefinite future.

4. After several years if nothing is done, the Secretary of Labor if appealed to, may intervene and say a dispute exists.<sup>37</sup>

<sup>36</sup> *Steele v. Louisville & R. L. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 325 U. S. 10.

<sup>37</sup> Past decisions of the Secretary, see footnote 11, *supra*. There is no guarantee that a future Secretary of Labor will follow the past decisions of his predecessors on this point.

5. Assume that the Secretary takes the same amount of time to reach a decision as he has in the past, about four to six months, he notifies the National Mediation Board of his decision as to whether the three-man Board should be convened.

6. At this point we finally have a timetable since within ten days after being notified by the Secretary of Labor, the National Mediation Board must appoint a "neutral" and within 30 days after appointment of the "neutral" a decision must be given. As the above shows, whatever else Section 3 is, it is not "speedy." From the very nature of the procedure there is no point where a Court may intervene to speed up the process.

The above time schedule is predicated upon the fact that the "new" union has grown to such a size or scope that there is at least a possibility of its being determined "national in scope." Under the petitioners' interpretation, of course, neither the "new" union nor any one else will know what is required to achieve a "national in scope" status because only the three-man Board can decide this, and a three-man Board has never been convened.<sup>38</sup> Therefore, the "new" union would have to make an educated guess based upon something more than the Secretary of Labor has required in past decisions.<sup>39</sup>

<sup>38</sup> Indeed, even if a three-man Board had already rendered a decision, there would be no guarantee that a future Board would guide itself by the former decision, without definite criteria being established.

<sup>39</sup> The Secretary of Labor makes his determination on the basis of evidence presented by both the claimant and the participating organizations. See note 7, *supra*. Thus, he is doing more than just inquiring as to whether a *prima facie* case is presented. While the opposing briefs attempt to equate the language "otherwise properly qualified" used by Congress in referring to the determination of the three-man Board, with "national in scope," for purposes of this case, a "new" union would be taking a grave risk in being guided by the Secretary of Labor's past decisions, if Section 3 is deemed the exclusive manner in which "national in scope" status can be attained. This is true not only in view of the fact that Congress used different language in referring to both findings, but also, under the opposition theory, the three-man Board would be merely duplicating the Secretary's function.



But just how can a "new" union grow to the size where it has at least a possibility of making a successful application when, according to the opposing briefs, one of the chief advantages of an exclusive determination under Section 3 is that an employee will not jeopardize his job by joining an "unqualified" organization. The suggested double-heading, i. e. belonging to the "new" union and to one of the qualified unions, is no workable alternative. See Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. L. J. 441, 446 (1955).

As pointed out in the Government brief, page 17, the "new" railroad union suffers a disadvantage that does not exist under conventional union shop agreements. When the "new" union is elected bargaining representative it gets only as members those employees who favor it. If, on the other hand, in a subsequent election, it loses by even one vote, all of its members must join the rival brotherhood to retain their jobs. Contrarywise, if the "new" organization retains the contract it must represent all those employees who belong to the rival organizations without receiving any dues contribution from them. Since the largest expenditures involved in the representation of employees is "policing the local contract" it becomes evident that these employees are not paying their fair share of the costs of union administration for benefits that they are receiving at the local level. Thus, the longer the new union, which is "national in scope" in fact, is prevented from having its status so determined, the longer Congressional intent in passing the Union Shop Amendment that each employee pay his fair share of the burden of administration costs is thwarted.<sup>40</sup> The opposing briefs all strive to point out that an organization which has not qualified under Section 3, First (f) is not

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<sup>40</sup> *Railway Employees' Dept. A. F. of L. v. Hanson*, .... U. S. ...., 100 L. ed. (Advance p. 633).



paying its fair share of the burden of administering the Act and therefore, could charge lower dues. The obvious answer, is that the only reason that UROC is not contributing is that the existing organizations have prevented it from so doing (see App. F, pp. 47a-61a). Adding these factors to those discussed above, namely; (a) there is no guide as to what is required of a union to become "national in scope" and (b) the time span for achieving such status is largely within the control of rival organizations, the possibility of a "new" union, contemplated by Congress in the Act, becomes very remote indeed. In other words, what the rival organizations are asking this Court to do is to entrench them so that no new challenge can ever be made to their organizations. Congress certainly did not intend this result when it passed Section 2 Eleventh, the "Union Shop Amendment."<sup>41</sup>

Balance the results of the lower Court's decision with the above. It is true, that at the present posture, Courts must make a determination of "national in scope" status. While it is conceivable that diverse opinions may be reached, the Courts will have the definition of the Secretary of Labor as a certain guide.<sup>42</sup> Thus, spurious litigation by small organizations would be discouraged because there would be no prospect of success. On the other hand, the qualified organizations would not arbitrarily start noncompliance proceedings against the members of the competing new union without carefully ex-

<sup>41</sup> Section 3 itself contemplates the existence of "new organizations." Thus, Section 3 (a) states: "Said Adjustment Board shall consist of 36 members, 18 of whom shall be selected by the carrier and 18 by such labor organizations of the employees national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act." (Italics supplied.)

<sup>42</sup> This Court has stated that an interpretation by the official entrusted with the administration and enforcement of the Section of the Statute "are entitled to great weight." *United States v. American Trucking Association*, 310 U. S. 549 (1940); *Kern River Co. v. United States*, 257 U. S. 147; *Billings v. Truesdell*, 321 U. S. 542.

amining its status. In addition, while under the opposing construction, there would be no guide as to the meaning of "national in scope" until the three-man Board acted, if it ever is convened, a ruling by this Court that Congress intended to adopt the Secretary of Labor's definition, would make for immediate certainty in a field where certainty is essential.<sup>43</sup> Such a ruling would give full meaning to all of the language used in the Act, including the phrase "otherwise properly qualified." This will agree with the opposing briefs which point out that the Act should be read as a whole and with the Government brief which urges that the "expanded language" of Section 152 Eleventh (the Union Shop Amendment) should be given full effect. Finally, as the B. L. E. points out on page 26 of its brief, in *Kepner v. United States*, 195 U. S. 100, 124, this Court said:

"It is a well settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."

The "settled and well-known meaning" was the definition given by the Secretary of Labor and that Congress intended to incorporate that definition into the Statute is confirmed by the "expanded language" used in the Statute.

In "balancing the conveniences" it should be pointed out that all of the opposing briefs make one common error. They all assume that the only alternative to holding Section 3 to be either an adequate or exclusive

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<sup>43</sup> Just how much diversion there can be among "experts" in the definition of the phrase is shown by the definition put forth by one of the *amici curiae*, the B. L. E., in *In the Matter of the American Railway Supervisors Association, Inc.*, p. 10 of the Secretary's opinion, *supra*. As the Secretary pointed out, many of the qualified organizations themselves would not be "national in scope" under the definition the B. L. E. advanced.

remedy, is Court intervention. As the Court below pointed out this is not so. Had the Railway Labor organizations and the carriers provided a fair, prompt and impartial tribunal under the Act, as they could have done, this case would not be in this court now." Thus, a vital reason for the Court review is the failure of the very organizations who oppose it, to set up a fair method under the Act.

Finally, it is argued, that "national in scope" is a term of art applied to the Railway Industry, and therefore, its meaning should be determined by "experts" who are familiar with its connotations. In *NLRB v. Highland Park Mfg. Co.*, *supra*, this Court held that the term "national or international organization" was used in its generally accepted meaning, and not as a term of art, despite a contrary ruling by the National Labor Relations Board. Mr. Justice Frankfurter dissented on the ground that the:

"best source . . . in determining whether a term used in the field of industrial relations has a technical connotation is the body to which Congress has committed the administration of the statute" (p. 327).

"Judge Hand stated this as follows: "If it be argued that the result of our decision is inevitably to interject the courts into the enforcement of the right granted by Section 152, Eleventh (a), we answer that that is not necessarily true. Section 153, Second, provides that if \* \* \* either party to an 'arrangement' setting up a 'System Board' is dissatisfied, it may elect to come under the jurisdiction of the Adjustment Board." Whether this implies that, if 'dissatisfied' the parties must altogether abandon a 'System Board' arrangement, after they have set it up; or whether it allows them to limit the scope of its jurisdiction, we need not say. If it means the second, it will be possible in the agreement setting up a 'System Board' to refer disputes such as that at bar to a panel set up under the National Adjustment Act, which can presumably be made impartial." (Record 43-44.) For example, an impartial tribunal could have been and still could be set up under the N. R. A. B. and the Union Shop Agreements could be written so that this tribunal would have jurisdiction to settle Union Shop disputes.

Here, Congress has committed the administration of the Section to the Secretary of Labor, and he has defined the phrase "national in scope" not as a term of art, but as being used in its commonly accepted meaning. Therefore, in the views of both the majority and minority of this Court in the *Highland* case, *supra*, it is the commonly accepted meaning of the words "national in scope" and not some expert opinion that is controlling.<sup>45</sup>

### CONCLUSION.

The instant case goes into the basic philosophy of the judicial function in the review of administrative board determinations. Over the last two decades, Congress has created many administrative bodies to deal with intricate problems in many specialized fields of law. The Federal Courts, led by decisions of this Court, have ceded large areas of their jurisdiction to these administrative bodies on the theory that these boards, as experts in the field, are better able to deal with the complex problem arising in these fields. No area of law better illustrates this than the railway labor field. But, together with the many salutary results of this development has come in some instances a disregard of the fundamental rights of the individual caused by an entrenchment of the "powers that be." Thus, the really fundamental issue in the present case is at what point will a Court intervene, in a field where it normally will not, to protect these fundamental individual rights from abuse.

Section 3, First (f) is no remedy for the employee. He has no access to it. The opposing briefs attempt to in-

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<sup>45</sup> There has been no agreement between "experts" as to what the term means. See footnote 39, *supra*.



corporate its technical provisions into Section 2, Eleventh (the Union Shop Amendment) without the slightest showing from Congressional debate or the Act itself that such an interpretation reflects Congressional intent and despite the fact that while Congress specifically referred to Section 3, First (h) in the "Union Shop Amendment" it made no mention of Section 3, First (f). Their argument that it is the exclusive remedy runs counter to the great weight of authority in the field and raises serious constitutional objections.

The justification advanced for the "judicial legislation" requested of this Court<sup>46</sup> is the so-called "adverse" results of the decision of the Court below. What the petitioners are in effect arguing in the first sections of their briefs is that Congress gave the system Board a "right" to be immune from judicial review. But, if this "right" exists, it is a qualified right which exists so long as the "rights" of others are not invaded.

The reasons of policy in the opposition briefs can all be translated into the terms of a single right, the "right to certainty." Thus, it is argued that only if Section 3, First (f) is deemed the exclusive manner in which "national in scope" status can be obtained, will carrier, qualified union, competing union and employee know what the term means and be protected.

The only certainty the employee will have under this interpretation is the certainty of having no choice. To hold his job he must belong to the qualified organization or double-head for an indefinite length of time in the hope that the union he desires to represent him either qualifies under a procedure, access to which the qualified organizations control, or wins the contract. In the latter event,

<sup>46</sup> See Judge Allen's dissenting opinion in the *Pigott* case, *supra*, pp. 26 and 27.



of course, if his union loses at the next election by a single vote he must rejoin the very union which he rejected. He, himself, has so little control over his own affairs that he cannot make any independent appraisal as to whether an "unqualified" union is "national in scope" because he has nothing to guide him since a three-man Board has never been convened for any purpose.

This right of certainty does not extend to a "new" union either. Even assuming it can get members in light of the last paragraph, it has no guide as to when it has reached sufficient scope or size to qualify as "national in scope" before a prospective three-man Board completely unfettered by any procedural or substantive standards.

Thus, the carrier and the qualified unions are unwilling to extend to the employee or to the "new" union the "right of certainty" which they desire for themselves. Contrasted with this, Court review on the basis of the Secretary of Labor's decisions gives immediate certainty to all. The employee and the "new" union definitely know what is required. Likewise, the carrier and the standard union are protected without the "standard union" being entrenched. Even this limited Court review can be avoided by carrier and "standard union" if a truly fair and impartial administrative procedure is set up under the Act.

Perhaps the most important result from the unanimous decision of the Court below is that the so-called "standard unions," faced with the prospect of a fair and impartial determination of a new and competing union's status will remain responsive to the wishes of their

membership and to the ever changing needs of a shrinking railway industry.

Respondents respectfully request that the Court affirm the decision of the Court below.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

**October Term, 1956.**

**No. 56.**

**PENNSYLVANIA RAILROAD COMPANY and  
BROTHERHOOD OF RAILROAD TRAINMEN,**

*Petitioners,*

*vs.*

**N. P. RYCHLIK, Individually and on Behalf of and as Representative of other employees of the Pennsylvania Railroad,**

*Respondent.*

**APPENDIX TO RESPONDENT'S BRIEF.**

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## APPENDIX A.

### Relevant Statutory Provisions.

Sections 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1186, 1189; 64 Stat. 1238; 45 U. S. C. §§152, 153) provide in part as follows:

“Section 2. • • •

“Eleventh: Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

“(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assess-



ments (not including fines and penalties uniformly required as a condition of acquiring or retaining membership): Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement

applicable to him; Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

“(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.”

“SEC. 3. First. There is hereby established a Board, to be known as the ‘National Railroad Adjustment Board,’ the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

“(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

“(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

“(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board

shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

“(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

“(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in any case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

“(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party desig-

nated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

“(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

“First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

“Second division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse

employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members five of whom shall be selected by the carriers and five by the national labor organization of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members; three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.



“(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

“(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

“(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as ‘referee,’ to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board should be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

“(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the

awards shall be furnished to the representative parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

“(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

“(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum of which he is entitled under the award on or before a day named.

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of

the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

“(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

“Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.”

## APPENDIX B.

Decision of the Secretary.

## UNITED STATES DEPARTMENT OF LABOR

Washington 25, D. C.

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IN THE MATTER  
of  
UNITED TRANSPORT SERVICE EMPLOYEES  
OF AMERICA,  
Claimant.

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This matter arises under the Railway Labor Act (48 Stat. 1185, 45 U. S. C., secs. 151 *et seq.*) and involves a claim asserted by a labor organization, the United Transport Service Employees of America,<sup>1</sup> of the right to participate in the selection of the labor members of the National Railroad Adjustment Board.

The relevant sections of the aforementioned Act are as follows:

*Section 3(a)* provides that " . . . the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act."

*Section 3(c)* provides that " . . . the national labor organizations, as defined in paragraph (a) of this section . . . shall prescribe the rules under

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<sup>1</sup> Hereinafter referred to as the claimant.

which the labor members of the Adjustment Board shall be selected and shall select such members."

*Section 3(f)* provides that "In the event of any dispute as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit the Secretary shall notify the Mediation Board accordingly \* \* \*." The remaining portion of this section provides for the establishment by the National Mediation Board of a board of three to investigate the qualifications of the claimant union and make a final determination of its right to participate.

The issue for determination in this matter is whether the claim to participate has merit.<sup>2</sup>

The Act makes no provision for the procedure required on the part of the Secretary of Labor in determining whether or not a disputed claim "has merit." It would appear, however, that unless the Secretary of Labor is to duplicate the functions of the board of three appointed by the National Mediation Board, which Board has final authority to pass on a disputed claim, his duty is merely to screen claims and to decide whether the evidence presented is sufficient to entitle the claimant to a hearing before an authoritative body. I decided to hold a formal hearing to assist in my determination of this matter.

A formal hearing was held on July 23, 1946, before a Hearing Officer duly appointed by me. In addition to Mr. Willard S. Townsend, president of the claimant organization, notice of the hearing was sent to the Railway Labor Executives Association and to each of the par-

<sup>2</sup> It is clear that a dispute exists as to the right of the claimant to participate.



ticipating labor organizations. Mr. Townsend appeared in person and was presented by counsel. Twenty of the twenty-two participating organizations were represented by Mr. Frank L. Mulholland of Toledo, Ohio. Individual representatives appeared on behalf of the remaining labor organizations.

Testimony was offered at the hearing in support of its claim by the claimant's representative, Mr. Willard S. Townsend. Full opportunity was given to each of the participating labor organizations in the Railway Executives Association to offer evidence and argument in opposition to the claim of the United Transport Service employees. The participating labor organizations have not, however, offered any evidence which in any way contradicted the testimony offered by the claimant nor does the record disclose any fundamental respects in which claimant's testimony has been seriously contested by the participating labor organizations.<sup>3</sup>

Under the pertinent parts of sections 2 and 3 of the Railway Labor Act, a union would appear to be eligible to participate in the selection of labor representatives on the Board if (1) it is national in scope; (2) it is freely organized and (3) it is organized to represent crafts or classes of employees.

*Whether claimant's labor organization is national in scope.*—Evidence was introduced indicating that the claimant union has a membership of over 7,500, organized into about 70 locals scattered throughout the country, and that it has collective bargaining agreements with about 38 carriers totalling approximately 108,000, and operating in at least 20 states. The legislative history of the National Railway Labor Act indicates that the term

<sup>3</sup> It should be noted that the Examiner gave counsel for the participating labor organizations an opportunity to file a memorandum or brief in answer to the facts and arguments submitted by the claimant organization and that no brief or memorandum in answer to the arguments supporting the claimant organization's contentions was filed.

"national in scope" was used to differentiate between the union organized within a single company and those representing employees from different companies.<sup>4</sup> On the basis of the entire record, I find that the claimant established a prima facie case that it is an organization national in scope.

*Whether claimant labor organization is freely organized.*—No contention was made that the claimant is not a freely organized organization. On the basis of the entire record, I find the claimant to be a freely organized labor organization.

*Whether the claimant union is organized to represent crafts or classes of employees.*—The evidence indicated that the claimant union represents Red Caps, Dining Car Waiters, Cooks, Train Porters, Maids, Clerical Personnel and Laundry Workers. Claimant purports to represent 85 per cent of the railroad red cap craft in the United States.<sup>5</sup> I find that this evidence is sufficient to support a prima facie case to the effect that the claimant union meets the requirement that it be organized along craft or class lines.

I find, on the basis of the entire record, that the claim of the United Transport Workers of America to representation in the selection of the labor members of the Railroad Adjustment Board has merit.

L. B. SCHWELLENBACH

Signed at Washington, D. C.  
this 2d day of January, 1947.

<sup>4</sup> Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Cong., 2nd Sess. (1934), pp. 19, 156.

<sup>5</sup> The contention was made that the claimant is not organized to represent a craft or class on the ground that it limited its membership to Negroes. The uncontradicted evidence showed that membership in the claimant is open to all, regardless of race, and that, in fact, the claimant includes within its membership workers who are White, Negro, Nisei, and Filipino.

## APPENDIX C.

Decision of the Secretary.

## UNITED STATES DEPARTMENT OF LABOR

Washington 25, D. C.

IN THE MATTER

of

BROTHERHOOD OF SLEEPING CAR PORTERS,  
Claimant.

This matter arises under the Railway Labor Act (48 Stat. 1185, 45 U. S. C., secs. 151 *et seq.*) and involves a claim asserted by a labor organization, the Brotherhood of Sleeping Car Porters,<sup>1</sup> to the right to participate in the selection of the labor members of the National Railroad Adjustment Board.

The relevant sections of the aforementioned Act are as follows:

*Section 3 First (a)* provides that " \* \* \* the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act."

*Section 3 First (c)* provides that "the national labor organizations, as defined in paragraph (a) of this section \* \* \* shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members."

<sup>1</sup> Hereinafter referred to as the claimant.

*Section 3 First (f)* provides that "In the event of any dispute as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit the Secretary shall notify the Mediation Board accordingly \* \* \*." The remaining portion of this paragraph provides for the establishment by the National Mediation Board of a board of three to investigate the qualifications of the claimant union and make a final determination of its right to participate.

The issues for determination in this matter are (1) whether a dispute exists, within the meaning of Section 3 First (f), so as to make appropriate the investigation and determination by the Secretary of Labor prescribed by that paragraph in such cases, and (2) in the event the first issue is decided in the affirmative, whether the claim to participate has merit.

In the absence of any statutory provision for procedure to be followed by the Secretary in the investigation of claims to participate, and following the precedent set in the matter of the similar claim of the United Transport Workers of America,<sup>2</sup> a formal hearing was held on May 13, 1948, before a Hearing Officer duly appointed by the Secretary of Labor Lewis B. Schwellenbach. Notice of the hearing was sent to Mr. A. Philip Randolph, International President of the claimant, to each of the labor organizations which participate in the selection of labor members of the Adjustment Board and to the Railway Labor Executives Association. Mr. Randolph appeared in person

<sup>2</sup> Determined by Secretary Lewis B. Schwellenbach January 2, 1947.

and was represented by counsel. All of the participating organizations were represented by counsel except the Brotherhood of Locomotive Engineers, the Seafarers International Union of North America and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and no representative appeared for the Railway Labor Executives Association.

Testimony was offered at the hearing in support of the claimant by Mr. A. Philip Randolph and by Mr. Théodore E. Brown, Director of Research for the claimant, both on the issue of the existence of a dispute and on the merits of the claim. Full opportunity was given to all of the participating organizations to present evidence and argument in opposition to claimant's position. The participating organizations presented no evidence on either issue, but it was argued on their behalf that claimant's evidence did not establish the existence of a dispute.<sup>3</sup>

### *The Jurisdictional Issue*

The facts on the basis of which a dispute is alleged to exist are substantially as follows:

On February 8, 1947, Mr. Randolph wrote to the Secretary of Labor applying for representation on the National Railroad Adjustment Board. He was advised at that time that his letter did not show the existence of a dispute such as would empower the Secretary to make a determination, and that if such a dispute existed he should submit evidence thereof to the Secretary.

On March 10, 1947, Mr. Randolph wrote to Mr. George M. Harrison, Grand President, Brotherhood of Railway

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<sup>3</sup> At the close of the hearing, the Hearing Officer offered to reconvene the hearing within a reasonable time, if necessary, to receive evidence from the participating organizations on the merits of the claim. No such evidence has been offered. The participating organizations submitted a memorandum brief on the jurisdictional issue, after the hearing, and claimant submitted a memorandum brief in reply thereto.



and Steamship Clerks, asking the procedure to be followed in applying for representation on the Board. Mr. Harrison replied, on March 13, that the participating organizations had formed a group to carry out these functions, and he referred Mr. Randolph to Mr. A. E. Lyon, Executive Secretary of the group. Accordingly, Mr. Randolph communicated his request to Mr. Lyon. Mr. Lyon answered that the Railway Labor Executives Association did not handle or decide questions of this nature, but that he was circularizing Mr. Randolph's letter among the members of the Association. Two months later, Mr. Randolph again wrote to Mr. Lyon, asking the name of the proper agency to which to apply for representation, and requesting any available information concerning appropriate procedures to follow for this purpose. At about the same time, he also wrote to Mr. Harrison again, mentioning the correspondence with Mr. Lyon and asking the names of the officials of the participating organizations so that he might write to them applying for representation. Receiving no reply to either of these letters, he wrote to the Secretary of Labor again, recounting the above correspondence, and stating that various telephone calls made by Mr. Theodore E. Brown, claimant's Research Director, to the Labor Department, the National Mediation Board and Mr. Lyon, had been similarly unproductive of information. He therefore requested a determination by the Secretary pursuant to Section 3 First (f) of the Railway Labor Act. The originals or copies of all the letters here referred to were submitted as exhibits at the hearing.

Mr. Brown testified at the hearing with respect to the telephone calls mentioned in Mr. Randolph's letter to the Secretary of Labor. He said that at the suggestion of a representative of the Labor Department he had called Mr. Robert Cole, Secretary of the National Mediation Board, on the telephone, and had been informed

by Mr. Cole that Mr. Lyon, in his capacity as Executive Secretary of the Railway Labor Executives Association, could supply all necessary information for securing participation. Mr. Brown then said that he had called Mr. Lyon, and had been told by him that the Railway Labor Executives Association as such did not choose the labor members of the Adjustment Board, although its members did. Mr. Brown stated that he had not received from Mr. Lyon any direct information as to the specific procedures used by the participating unions in selecting Board labor members.

At the hearing and in a brief the position of the participating organizations was that they had not been notified in any proper way of the desire or the application of claimant for participation in the selection of labor members of the Board; that they had taken no adverse action and could not predict what action would be taken if application were properly made, and that accordingly no dispute could be said to exist and the proceeding was not properly before the Secretary of Labor.

It is clear upon the record that the merits of the instant claim have not been controverted; indeed, the participating organizations seem to have carefully avoided taking any position on this matter. But it does not seem to me that the word "dispute" as used in the Act must be narrowly construed to denote only a controversy on the merits. If so narrow a construction were required, it would be possible for the participating organizations, by refraining from any action on applications to be admitted to participation, effectively to prevent any new organizations from participating. It seems obvious that Section 3 First (f) did not contemplate such a stalemate. On the contrary, this Section expressly provides a means for securing action on a claim to participate when such action is not voluntarily forthcoming from the participating organizations.

Nor is the Secretary bound to enforce a strict rule of "exhaustion of administrative remedies" against a claimant when it is reasonably apparent that this would only cause further delay with no assurance of a determination on the merits. It should be noted that after making inquiries by letter and telephone over a period of almost a year ~~Mr.~~ Randolph had not secured any information as to the identity of the parties to whom application should be made, or the procedure to be followed. Counsel for the participating organizations suggested that Mr. Randolph should have written to each such organization individually. I cannot regard his failure to do so as jurisdictional so far as this proceeding is concerned. He had reason to believe, on the basis of Mr. Lyon's letter to him, that all but the few participating organizations which have no representative in the Railway Labor Executives Association had been informed of his application.<sup>4</sup> Furthermore, there is no procedure established either in the Act or by regulations<sup>5</sup> for the making of such application. Under the circumstances, to insist that Mr. Randolph now personally communicate with each of the participating organizations before seeking the aid of the Secretary of Labor would seem unnecessarily legalistic.

I therefore determine that a dispute exists, within the meaning of Section 3 First (f) of the Railway Labor Act, and that determination by the Secretary of Labor as to whether the instant claim has merit is appropriate at this time.

### *Merit of the Claim*

The eligibility of a union for participation in the

<sup>4</sup> Counsel for the organizations represented in the Association stated at the hearing that these organizations had in fact received copies of Mr. Randolph's letter from Mr. Lyon.

<sup>5</sup> The participating organizations would appear to have power, under Section 3 First (c) of the Act, to promulgate appropriate regulations for this purpose.

selection of labor members of the National Railroad Adjustment Board, under Sections 2 and 3 of the Act, depends on (1) whether it is national in scope, (2) whether it is freely organized and (3) whether it is organized to represent crafts or classes of employees.

*Whether claimant is national in scope.* On this question, the uncontradicted evidence indicates that claimant has a total membership of some 15,000 distributed among 19 local unions with members in all but 3 or 4 States. For administrative purposes the International organization is divided into 5 geographic zones, having their headquarters in New York City, Detroit, Chicago, St. Louis and Oakland, California, respectively. Claimant has an international charter from the American Federation of Labor. It has collective bargaining agreements with the Pullman Company, and with about 27 other carriers, apart from an agreement in process of negotiation, at the time of the hearing, with the Atchison, Topeka and Santa Fe Railroad. It also appears that in the ten years from 1937 through 1947 claimant progressed the second largest number of cases through the Third Division of the National Railroad Adjustment Board<sup>a</sup> of all the labor organizations with membership falling within the jurisdiction of that Division.

I find, on the basis of the entire record, that claimant has established a prima facie case that it is national in scope within the meaning of the applicable provisions of the Act.

*Whether claimant is freely organized.* No contention has been made that claimant fails to meet this requirement.

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<sup>a</sup> All disputes involving members of claimant would come before the Third Division of the Board. Under Section 3 First (h), this division has jurisdiction of disputes involving "station, tower, and telegraph employees, train dispatchers, station and store employees, signalmen, sleeping car conductors, sleeping car porters, and maids and dining car employees."

I find on the basis of the entire record that claimant is a freely organized labor organization.

*Whether claimant is organized to represent crafts or classes.* The record indicates that claimant represents the following crafts or classes of employees: Pullman car porters, maids, attendants and bus boys; sleeping, parlor and buffet car porters employed by the Canadian Pacific Railway and train porters, chair attendants and coach porters employed by the other carriers with which claimant has collective bargaining agreements. Claimant is also seeking to represent certain classes of Pullman maintenance employees, but it does not appear that it has any agreements covering such employees.

I find, on the basis of this evidence, that claimant has established a prima facie case that it is organized to represent crafts or classes of employees.

On the basis of the entire record, I find that the claim of the Brotherhood of Sleeping Car Porters to participate in the selection of labor members of the National Railroad Adjustment Board has merit.

L. B. SCHWELLENBACH

Secretary of Labor

Signed at Washington, D. C.  
this 8th day of September, 1948.

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<sup>7</sup> At the hearing, counsel for claimant made it clear that the claim is not in any way based on the Canadian membership of the Brotherhood employed in Canada and outside the jurisdiction of the Board.



## APPENDIX D.

## Decision of the Secretary.

UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF LABOR

Office of the Secretary

IN THE MATTER

of

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION, Inc.

The American Railway Supervisors Association, Inc., a labor organization, has made claim that it is entitled to participate in the selection and designation of the labor members of the National Railroad Adjustment Board under the provisions of the Railway Labor Act (48 Stat. 1185; 45 U. S. C., Secs. 151 *et seq.*).

The pertinent provisions of the Railway Labor Act are as follows:

Section 3 First (a): "That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act."

Section 3 First (c): "The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other

medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board."

Section 3 First (f): "In the event of any dispute as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit the Secretary shall notify the Mediation Board accordingly \* \* \*."

The Act makes no provision for the procedure to be followed by the Secretary of Labor in his investigation and determination of whether the claim of a labor organization, in the event a dispute arises as to its right to participate in the designation and selection of the labor members of the Adjustment Board, has merit. In the absence of any such statutory provision, and following the precedent set in the matter of earlier and similar claims, a hearing was held on March 9, 1953, before a Hearing Officer duly appointed by the Secretary of Labor. In addition to Mr. J. P. Tahney, Grand President of The American Railway Supervisors Association, Inc., hereinafter referred to as the claimant association, notice of the hearing was sent to the Railway Labor Executives

<sup>1</sup> The remaining portion of this subsection provides for the establishment by the National Mediation Board of a board of three to investigate the qualifications of the claimant union and make a final determination of its right to participate.

Association and to each of the labor organizations now participating in the selection of the labor members of the Adjustment Board.

Mr. Tahney appeared at the hearing in person on behalf of the claimant association and offered his testimony together with certain documentary exhibits, not only with respect to the merits of the claim to the right to participate, but also upon the issue of the existence of a dispute. Mr. C. M. Mulholland appeared as counsel on behalf of the Railway Labor Executives' Association and on behalf of twenty-one, or all but a few, of the participating labor organizations.<sup>2</sup> The Brotherhood of Locomotive Engineers was represented by Mr. Clifford W. Kealey and the Order of Railway Conductors of America was represented by its vice president and legislative representative, Mr. W. D. Johnson. No evidence was offered by the participating organizations on the issues. Such information as they did develop was confined to that

<sup>2</sup> These organizations are:

American Train Dispatchers' Association  
 Brotherhood of Maintenance of Way Employees  
 Brotherhood of Railroad Signalmen of America  
 Brotherhood Railway Carmen of America  
 Brotherhood of Railway and Steamship Clerks, Freight Handlers,  
 Express and Station Employees  
 Brotherhood of Sleeping Car Porters  
 Hotel & Restaurant Employees and Bartenders International  
 Union  
 International Association of Machinists  
 International Brotherhood of Blacksmiths, Drop Forgers and  
 Helpers  
 International Brotherhood of Boilermakers, Iron Ship Builders  
 & Helpers of America  
 International Brotherhood of Electrical Workers  
 International Brotherhood of Firemen & Oilers  
 International Longshoremen's Association  
 National Marine Engineers' Beneficial Association  
 National Organization Masters, Mates & Pilots of America  
 Order of Railroad Telegraphers  
 Railroad Yardmasters of America  
 Sheet Metal Workers' International Association  
 Switchmen's Union of North America  
 Railway Employees' Department A. F. of L.  
 Brotherhood of Locomotive Firemen and Enginemen  
 Railway Labor Executives' Association

elicited by their representatives, principally Mr. Mulholland, in their examination of Mr. Tahney, the only witness to testify and to supply factual data. Pursuant to leave granted at the close of the hearing, a memorandum brief was filed by Mr. Mulholland on behalf of the organizations represented by him, to which a reply brief has been filed by Mr. Tahney on behalf of the claimant association. The briefs are primarily directed to the question of whether or not the claimant association is a labor organization "national in scope" within the meaning of the Railway Labor Act.

The participating organizations have made no contention that the right of the claimant association to participate is not in dispute within the meaning of Section 3 First (f) of the Act.<sup>3</sup> The existence of a dispute prior to and at the time of the hearing is amply shown by the exchange of correspondence between the claimant association and the group of organizations known as the Nationally Organized Railway Labor Organizations Qualified to Participate in the Formation of the National Railroad Adjustment Board, originating with the letter addressed by Mr. Tahney to Mr. A. E. Lyon, secretary of the named group of organizations, under date of November 30, 1949, and ending with his letter to Mr. G. E. Leighty, Chairman of the group, dated April 23, 1952.<sup>4</sup> Mr. Tahney's letter of November 30, 1949, expressly requested recognition of the claimant association as a participating organization in the selection of the labor

<sup>3</sup> At the hearing, Mr. Mulholland made it clear that he was then taking no position on the claim, inasmuch as he did not know what the position of the participating organizations was or would be until a later date, but that he did wish to protect their interest on the record in the event they decided to oppose the claim (Tr. pp. 10, 80-1). Later, Mr. Mulholland filed a brief on behalf of most of the labor organizations participating in the selection of the labor members of the National Railroad Adjustment Board and the Railway Labor Executives Association controverting the merit of the claim.

<sup>4</sup> The exchange of correspondence referred to is marked Association's Exhibit A 1-10.

members of the Adjustment Board. It is quite apparent from the correspondence that followed that almost two and one-half years elapsed without determinative action by the group upon the application of the claimant association before the claimant association concluded that, in view of such inaction, it would proceed to avail itself of the means for securing action provided in the Railway Labor Act.

In the determination of the claim of the Brotherhood of Sleeping Car Porters on September 8, 1948, the Secretary of Labor considered a situation similar to this and expressed the opinion, in which I concur, that the word "dispute" as used in the Act was not to be so narrowly construed as to make it possible for the participating agencies effectively to prevent new organizations from participating by merely refraining from any action on application for admissions to participation.

On the basis of the entire record, I find that a dispute exists, within the meaning of Section 3 First (f) of the Railway Labor Act, requiring a determination at this time as to whether the instant claim has merit.

By the terms of Section 3 First (a) of the Act, a labor organization is entitled to participate in the selection of the National Railroad Adjustment Board if it is national in scope and organized in accordance with the provisions of Section 2 of the Act.

As to whether the claimant association is national in scope, the following facts appear to be uncontroverted. The claimant association was organized on November 14, 1934, about four months after the Act was amended on June 21, 1934. The offices of its Grand Lodge are located at 53 West Jackson Boulevard, Chicago, Illinois. It has ten full-time employees and an annual salary expenditure of \$66,000. As of the date of the hearing, 88 charters had been issued to 78 lodges located in various parts of the United States and to a limited extent in Canada.



As of March 1, 1953, the claimant association had negotiated a total of 109 collective bargaining agreements with 71 carriers operating in all sections of the country. The total mileage of the carriers represented, as last computed and shown in the claimant association's Exhibit B, is 113,153. No less than 41 of the 71 carriers in contractual relationship with the association are Class I carriers which, together with the contract with the Pullman Company, account for 74 of the total 109 contracts negotiated. The 41 Class I carriers which have contracted with the association constitute 30 per cent of the 136 Class I carriers listed on Table 12-A of the Eighteenth Annual Report of the National Mediation Board.

The claimant association has a total dues-paying membership of 8,088. According to Mr. Tahney, it is not an overstatement to say that the number of positions represented by the claimant association would be approximately 9,500.

The primary objective of the claimant association, as stated in its Constitution and General Laws (Article I, Section 3[g]) is:

"To unite and combine all subordinate officials of any and all carriers engaged in interstate commerce, which subordinate officials are subject to the Carriers' continuing authority to direct and control the manner in which their services shall be rendered; . . ."

The foregoing provision of the association's constitution was patterned after the language of Section 1, fourth paragraph, of the Act which reads, in part, as follows:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who per;

forms any work defined as that of an employee *or subordinate official* in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders \* \* \*." (Italics supplied.)

Since its organization the claimant association has taken an active part in having the following groups of subordinate officials given recognition or continued recognition by the National Mediation Board as separate crafts or classes of employees entitled to representation under the Railway Labor Act:

Mechanical department foremen and/or supervisors of mechanics

Subordinate officials maintenance of way and structures

Technical engineers, architects, draftsmen and allied workers.

The subordinate officials in the craft or class of Mechanical Department Foremen and/or Supervisors of Mechanics constitute by far the majority of the claimant association's membership, and it is on their behalf that the claimant association has negotiated the greatest number of agreements through collective bargaining. As of March 1, 1953, there were a total of 68 agreements applicable to mechanical foremen, covering a total of 6,600 dues-paying members of the claimant association. It is estimated that the total number of positions which the claimant association is authorized to represent in this craft or class would easily reach 7,000. Such representation extends throughout the country. The claimant association, for example, represents the mechanical

foremen of the Pullman Company on a nationwide basis. Table 8 of the National Mediation Board Report (p. 35) shows that as of June 30, 1952, the claimant association's representation of the one craft or class of supervisors of mechanics alone constituted 45 per cent of the total mileage of the 136 Class I or "principal" carriers "on which employees were represented by organizations."

Next to the mechanical foremen in the number of agreements negotiated by the claimant association is the craft or class of "Subordinate Officials Maintenance of Way and Structures." The approximate number of positions which the association claims that it is authorized to represent in the group is 1,700, making a total of approximately 8,700 positions represented by the association in the two crafts or classes so far identified.

On the basis of figures cited by the claimant association indicating that there are 3,387 employees in the craft or class of Subordinate Officials Maintenance of Way and Structures and close to 11,000 employees in the craft or class of Mechanical Department Foremen and/or Supervisors of Mechanics, or a total of 14,371 employees or positions subject to representation under the Railway Labor Act in both crafts or classes, the 8,700 positions represented by the claimant association constitutes over 60 per cent of the total positions. Broken down by craft or class, the claimant association represents 50 per cent of the subordinate officials in the maintenance of way department and about 64 per cent of the mechanical department foremen and/or supervisors of mechanics.

The remaining 17 agreements negotiated by the claimant association, accounting for the remaining 800 positions represented, are divided in their application to the following groups of subordinate officials: technical engineers, yardmasters, storekeepers, station masters, wire chiefs, special agents, bridge foremen and dining car stewards.

• As the brief of the participating organizations points out, the Railway Labor Act does not define the phrase "national in scope" nor prescribe any specific standards or tests for its proper interpretation. Aside from the indication that the term "national in scope" was used to differentiate between a union organized within a single company or carrier and those representing employees of different companies,<sup>5</sup> there is nothing in the legislative history of the Act of assistance in considering the question of whether a labor organization is national in scope.

The participating organizations urge that in the absence of any guides in the statute and in its legislative history, the most logical approach to the question of whether a labor organization is national in scope is to look to the conditions existing at the time the statute was enacted and the purpose which Congress sought to accomplish. Asserting that inasmuch as the National Railroad Adjustment Board was established to further the process of collective bargaining as it was then being carried on in the railroad industry and to provide on a national basis for the adjustment of disputes unadjusted in conference between representatives of labor and management, the participating organizations argue that in providing for the selection of members of the Adjustment Board by labor organizations national in scope, Congress had in mind the past practice of collective bargaining in the industry and was referring to labor organizations whose structure and function corresponded to those which had perfected the system of collective bargaining which Congress desired to supplement and whose activities made them a definite factor in the industry as a whole. It is contended that the claimant association, in order to meet seven enumerated characteristics of the

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<sup>5</sup> Hearings before the Senate Committee on Interstate Commerce on S. 3266, 73rd Congress, 2nd Session (1934), pp. 19, 156.

labor organization which Congress assertedly had in mind when it used the phrase "national in scope," must

- (1) Be a "craft or class" organization not purporting to represent employees in more than one craft or class;
- (2) Have the maturity and stability to enable it to bargain effectively for the employees it represents;
- (3) Possess the economic strength which makes resort to the Adjustment Board a necessary means of disposing of disputes to prevent interruptions to commerce and the operations of the carriers;
- (4) Successfully negotiate standard rules and working conditions;
- (5) Be composed of members among whom there is a community of interest;
- (6) Bargain collectively on a national basis in national movements affecting all carriers simultaneously; and
- (7) Represent the vast majority of the employees in the crafts or classes which it purports to represent.

In the two earlier cases in which the question of whether a claimant labor organization is national in scope has been before the Secretary of Labor,<sup>6</sup> consideration was given to such factors as the geographical area in which its representation extends, the number of employees represented, the number of agreements, the number of carriers with whom agreements are held, and the mileage of such carriers. These factors are relevant by virtue of the plain and unambiguous language of the statute. Most, if not all, of the points upon which

<sup>6</sup> *In the Matter of United Transport Service Employees of America*, determined January 2, 1947; and *In the Matter of Brotherhood of Sleeping Car Porters*, determined September 8, 1948.



the participating organizations rely in contending that the claimant association is not national in scope are not responsive to the question and are indicative of an effort on the part of the participating organizations to read into the statute prerequisites to the right of participation which Congress presumably did not see fit to impose. An especially appropriate observation was made by the Supreme Court of the United States in *National Labor Relations Board v. Highland Park Manufacturing Co.*, 341 U. S. 322: "If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition."

Had Congress, for example, intended that national labor organizations which did not confine their representation to a single craft or class were not eligible to participate in the selection of the labor members of the Adjustment Board, it may be presumed that it would have so indicated. That some of the presently participating organizations extend their representation to more than one craft or class is an accepted fact. The overlapping of jurisdiction among these organizations is not, in all cases, limited to fringe employees whose proper classification is subject to some doubt. The claimant association is to be considered no less a craft or class organization because it represents, in varying degrees, more than one craft or class of subordinate officials.

To construe the term "national in scope" as urged by the participating organizations would be contrary to the rule laid down by the Supreme Court that where the words of a statute are plain, the Court is not at liberty to add additional and qualifying terms. *Osaka Shosen Line v. United States*, 300 U. S. 98, 101. Even if it can be said that the argument of the participating organizations casts some doubt as to what Congress had

in mind in its use of the term, the decision of the Supreme Court in the last cited case is also authority for the rule that where legislative intent has been expressed in plain and unambiguous words, the Courts must apply and enforce the statute as written, the language is conclusive, and there is no need to resort to construction or to the legislative history.

Except to state that the claimant association appears to represent a majority of mechanical foremen, the craft or class in which it is "majoring," it would serve no useful purpose to deal specifically with each of the other points raised by the participating organizations and the answer given thereto by the claimant organization. The general observation may be made that the claimant association has acquired and achieved a character and standing comparing favorably with the accomplishments of labor organizations whose right to participate has been recognized. In any event, the claimant association has amply shown that it is a labor organization "national in scope," as the term is used in the Act without limitation or restriction (save to the extent heretofore indicated), and I so find.

The participating organizations do not contend that the claimant association is not organized in accordance with the provisions of Section 2 of the Act. On the basis of the record before me, I find that it is so organized, i. e., that it is freely organized and that it is organized to represent crafts or classes of employees.

The claim of the American Railway Supervisors Association, Inc., to participate in the selection of labor members of the National Railroad Adjustment Board is accordingly found to have merit.

MARTIN P. DURKIN

Secretary of Labor

Signed at Washington, D. C.,  
this 8 day of Sept., 1953.

## APPENDIX E.

## Decision of the Board.

## RAILROAD RETIREMENT BOARD

## JURISDICTIONAL DOCKET No. 29

IN THE MATTER

of

The Status of THE AMERICAN RAILWAY  
SUPERVISORS ASSOCIATION, Inc., as an  
"Employer" Under the Railway Re-  
tirement Act and the Railroad Un-  
employment Insurance Act.

*Statement*

On October 25, 1938, the President of The American Railway Supervisors Association, Inc., hereinafter called the Association, was informed of the Board's ruling that the Association was not an "employer," within the meaning of Section 1 (a) of the Railroad Retirement Act of 1937, but was a "railway labor organization" not an employer, service to which is creditable as "employee representative" service in accordance with the provisions of Section 1 (b) of that Act.<sup>1</sup>

<sup>1</sup> Section 1 (b) of the Act provides in part as follows:

The term "employee representative" means any officer or official representative of a railway labor organization other than a labor organization included in the term "employer" as defined in section 1 (a) who before or after the enactment date was in the service of an employer as defined in section 1 (a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, as amended, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

The ruling with respect to its "employer" status was protested by the Association and from time to time evidence has been introduced in support of its position that it is a railway labor organization "national in scope," organized in accordance with the Railway Labor Act, as amended. On March 12, 1951, the General Counsel informed the Association of his opinion that evidence submitted by the Association was not sufficient to rebut the presumption arising under Section 202.15(a) of the Board's Regulations, 20 C.F.R. [that it is not national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended] in that such evidence does not show that the reasons for the Association's failure to establish a right to participate in the selection of labor members of the National Railroad Adjustment Board have no relation to its being a labor organization, national in scope, and organized in accordance with the provisions of the Railway Labor Act, as amended.

Under date of August 28, 1951, the Association requested that the General Counsel's opinion and all the evidence of record in the case be reviewed by the Board, and that a decision be rendered by the Board as to the Association's status as an employer under the Railroad Retirement Act. On January 9, 1952, a hearing was held before the Board at which the Association presented evidence and argument in support of its position.

It is the Association's contention that it is national in scope because it was "set up and established for the purpose of operating on a nation-wide basis," and that its "record of effective collective bargaining and number of agreements in effect on a nation-wide basis" shows that it is "national in scope." It is claimed that the Association is the largest organization representing "subordinate officials" in the railroad industry, that it has "more employees, contracts and represent[s] more posi-

tions" than several railway labor organizations that have been recognized as "employers" by the Board, and that its membership "is spread throughout every state within the nation." It is pointed out that the National Mediation Board, in certain tables in its annual reports, identifies the Association as a "National organization" rather than a system association or local union; and that under the provisions of the Railway Labor Act, the Association receives the services of the National Mediation Board and the National Railroad Adjustment Board, and has "handled more cases on the Fourth Division of the National Railroad Adjustment Board during many years since 1934 than those individuals who enjoy labor membership." It is also argued that the present Association has the same general jurisdiction as the International Association of Railway Supervisors, an organization no longer in existence, which was accorded the right to participate in the selection of labor members of the United States Railroad Labor Board under the Transportation Act of 1920.

The following facts with respect to the organization and operations of the Association are revealed by the evidence of record:

The Association, composed of railroad subordinate officials,<sup>2</sup> was organized on November 14, 1934, and was incorporated on July 24, 1935, under the laws of the State of Illinois. The purpose of the Association, as set forth in Article I of its Constitution and General Laws, is to organize all subordinate officials of all carriers and to represent them in collective bargaining with respect to their wages, hours, and working conditions. The Association states, and there is no evidence to the contrary, that no carrier has ever exercised interference, influence or coercion for the benefit of the Association in

<sup>2</sup> Article XV of the Association's Constitution and General Laws.



connection with its designation as a representative of carrier employees. The Constitution and General Laws (Article XVI) contain provisions for dues, fees and assessments for the support of the Association.

Starting with 28 members, the Association has grown gradually, and, according to its annual report for the fiscal year ended August 31, 1951, it had total membership of 7,338, represented by 96 contracts on 67 railroads having a total mileage of 113,153.<sup>3</sup> In addition to ten full-time employees, the Association has approximately 50 part-time employees (general chairmen) who are also carrier employees.

The Association asserts that no attempt was made by it or in its behalf, prior to 1946, to establish a right of participation in the selection of members of the National Railroad Adjustment Board. However, it has submitted copies of correspondence, showing that on January 29, 1946, the Chairman of the Fourth Division of the National Railroad Adjustment Board suggested to two "absentee" members that they withdraw and join him in recommending that the Association and the Railroad Yardmasters of America be appointed in their stead; and that, on November 30, 1949, Mr. A. E. Lyon, Secretary of the "Nationally Organized Railway Labor Organizations Qualified to Participate in the Formation of the National Railroad Adjustment Board," had been formally petitioned by the Association to "direct the participating members on the Fourth Division of the National Railroad Adjustment Board to recognize [the] Association in the selection of any future labor members." The Association stated that, notwithstanding its petition, representatives of the Railroad Yardmasters of America and the Railway Patrolmen's International Union, were chosen

<sup>3</sup> At the hearing before the Board, the Grand President of the Association said the membership at that time was 7691 and the number of contracts was 100.

when two new labor members were selected, and that the Association had been informed by Mr. Lyon that its application had been considered at a meeting of the "nationally organized railway labor organizations" in January, 1951, but a motion was adopted to postpone action until some future meeting of the group, and "The subject remains on the agenda for further consideration and will be brought up when another meeting is held." Because of this delay, the Association stated that it believed the issue was being evaded and that the "Nationally Organized Railway Labor Organizations Qualified to Participate in the Formation of the National Railroad Adjustment Board" had "no intention of even giving . . . a definite answer, either one way or the other, as to the recognition" the Association is "rightfully entitled to." The Association alleges, but has submitted no evidence to support its views, that competing labor organizations which do enjoy the right of participation in the selection of labor members of the National Railroad Adjustment Board have exerted their influence against the Association in its efforts to secure the same right.

### *Discussion*

Section 1(a) of the Railroad Retirement Act of 1937, as amended,<sup>4</sup> provides in part as follows:

. . . The terms "employer shall also include . . . railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, . . .

<sup>4</sup> As well as Section 1(a) of the Railroad Unemployment Insurance Act, as amended; see also 20 C.F.R. 301.4.

Section 3 First (a) of the Railway Labor Act, as amended, wherein provision is made for the establishment of the National Railroad Adjustment Board, provides in part:

• • • the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

Except that the Railroad Retirement Act specifies "railway" labor organizations, its requirements are the same as those of Section 3 First (a) of the Railway Labor Act in that the labor organizations must be (1) national in scope and (2) organized in accordance with the provisions of the Railway Labor Act, as amended.

It has been established to the satisfaction of the Board, on the basis of evidence of record, that the Association is a "railway labor organization," within the meaning of the Act. The evidence also shows that the Association has been authorized and designated as the collective bargaining representative of employees on a number of railroads. Investigation has not disclosed any indication of interference, influence, or coercion by any carrier for the Association's benefit, and from the Association's purpose, the nature of its activities, the provisions in its Constitution and General Laws for its financial support, and the manner in which its negotiations with carriers have been conducted, it may be inferred that such interference, influence, or coercion does not exist. These facts and inferences have been recognized by the Board in ruling that the Association is a railway labor organization to which "employee representative" service could be rendered. Therefore, the question here to be resolved in determining whether the Association is an "employer"

is whether it is "national in scope," and "organized in accordance with the provisions of the Railway Labor Act, as amended," within the meaning of the Act and the Board's Regulations.<sup>5</sup> The section of the Board's Regulations relating to this question is Section 202.15.

In adopting Section 202.15, the Board took into consideration the practically identical language of Section 1(a) of the Railroad Retirement Act and Section 3 First (a) of the Railway Labor Act and the desirability of avoiding conflicting determinations under the two Acts. Recognizing that the primary interest of the labor organizations, i. e., the representation of their members in collective bargaining, is under the Railway Labor Act, it was reasoned that the establishment of a right to participate in the selection of members of the National Railroad Adjustment Board would be a normal objective of an organization which actually is "national in scope" and "organized in accordance with the provisions of the Railway Labor Act, as amended." Such reasoning gives rise to a presumption that a labor organization which has established such a right of participation is "national in scope" and "organized in accordance with the provisions of the Railway Labor Act, as amended." On the other hand, the fact that a labor organization doing business under the Railway Labor Act has not established that right leads to the presumption that it is not "national in scope" and "organized in accordance with the provisions of the Railway Labor Act, as amended." The Board has therefore incorporated these presumptions in Section 202.15 (a) of its Regulations, quoted below:

An organization doing business on or after June 21, 1934, which establishes, in accordance with (1), (2), or (3) of this paragraph, a right, under sec-

<sup>5</sup> Established pursuant to Section 10(b)4 of the Railroad Retirement Act, which authorizes the Board to "establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of" the Acts.

tion 3 "First" (a) of the Railway Labor Act, as amended (48 Stat. 1189; 45 U.S.C. 153 "First" (a)), to participate in the selection of labor members of the National Railroad Adjustment Board, will be presumed, in the absence of clear and convincing evidence to the contrary, to be, from and after the date on which such right is thus established, a labor organization, national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended. Such organization can establish that it is an employer by establishing, in accordance with paragraph (b) of this section, that, as a labor organization, national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended, it is a "railway" organization. An organization, doing business on or after June 21, 1934, which has not established such a right of participation, will be presumed not to be a labor organization, national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended, and such presumption can be rebutted only by clear and convincing evidence satisfactory to the Board showing that the reasons for the organization's failure to establish such a right have no relation to its being a labor organization, national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended. Only after such presumption has thus been rebutted will further evidence as to whether the organization is an employer be considered. (The establishment or nonestablishment of such a right of participation will not raise any presumption as to whether an organization is, or is not, a "railway" organization. The existence of this qualification shall be determined in accordance with para-



graph (b) of this section.) . An organization will have established such a right or participation if:

(1) It has in fact participated in the selection of labor members of the National Railroad Adjustment Board and has continued to participate in such selection; or

(2) It has been found, under section 3 "First" (f) of the Railway Labor Act, as amended (48 Stat. 1190; 45 U.S.C. 153 "First" (f)), to be qualified to participate in the selection of labor members of the National Railroad Adjustment Board; or

(3) It is recognized by all organizations, qualified under subparagraphs (1) or (2) of this paragraph, as having the right to participate in the selection of labor members of the National Railroad Adjustment Board.

There is no claim or evidence that the Association has ever established the right to participate in the selection of members of the National Railroad Adjustment Board. In fact, the Association has complained of its inability to obtain a decision on its right so to participate. It will be noted that the Regulations, recognizing that an organization doing business on or after June 21, 1934 (the enactment date of the Railway Labor Act, as amended), might actually be national in scope and organized in accordance with the provisions of the Railway Labor Act without having established a right to participate in the selection of labor members of the National Railroad Adjustment Board, provide that the presumption [that an organization which has not established such a right is not national in scope and thus organized] can be rebutted by clear and convincing evidence satisfactory to the Board, showing that the reasons for the organization's failure to es-

establish such a right have no relation to the question of its being a labor organization "national in scope" and "organized in accordance with the provisions of the Railway Act, as amended."

Most of the Association's arguments in support of its position have no relation to the *reasons* for its failure to establish a right of participation in the selection of labor members of the National Railroad Adjustment Board. It is claimed that the Association was "set up and established for the purpose of operating on a nation-wide basis." This, of course, indicates merely an objective to become national in scope, but does not show that its aim has been achieved. When evidence submitted by the Association with respect to the size of the organization is viewed in the light of Table 8 of the National Mediation Board's annual report for the fiscal year ended June 30, 1951, it is seen that actually the Association is the representative, in all except one class, on only a negligible percentage of the total mileage covered by the table, while in the case of the largest group, supervisors of mechanics, the Association is the representative on only two-fifths of the total mileage.<sup>6</sup>

Also unrelated to the question at issue are other contentions of the Association. It is claimed that the Association is "national in scope" because it has received

<sup>6</sup> Table 8, which is entitled, "Number and mileage of principal carriers by railroad where employees are represented by various labor organizations, by crafts or classes, June 30, 1951," sets forth certain figures with respect to representatives on 136 carriers by railroad whose aggregate mileage is 253,235. According to the table, the Association represented yardmasters on four carriers having total mileage of 10,765, or 4% of the aggregate mileage of the carriers represented in the table; wire chiefs and station masters on one carrier with mileage of 7,968, or 3% of the aggregate mileage; roadmasters on two carriers having total mileage of 9,757, or 4% of the aggregate mileage; technical employees on six carriers having total mileage of 22,484, or 9% of the aggregate mileage; subordinate officials in Maintenance of Way and Structures Department on nine carriers having total mileage of 24,710, or 10% of the aggregate mileage; foundry employees on one carrier with mileage of 7,577, or 3% of the aggregate mileage; and supervisors of mechanics on 30 carriers having total mileage of 100,758, or 40% of the aggregate mileage.

the services of the National Mediation Board and the National Railroad Adjustment Board; however, the services of those agencies are not restricted to labor organizations, national in scope. No significance can be attached to the fact that in certain tables in its reports the National Mediation Board designates the Association as a "National organization," since this appears to be merely a means of designating all organizations which are not confined to one system or locality. Nor does the fact that the International Association of Railway Supervisors was accorded the right under the Transportation Act of 1920 to participate in the selection of Labor members of the United States Railroad Labor Board, establish for the present Association a similar right under the Railway Labor Act, particularly since there was no "national in scope" requirement for participation under the Transportation Act.<sup>7</sup>

The evidence and arguments which have been presented are not sufficient to establish that the Association meets the requirements of the Board's Regulations, quoted above, in that they do not show clearly and convincingly that the reasons for the Association's failure to establish the right of participation in the selection of labor members of the National Railroad Adjustment Board "have no relation to its being a labor organization, national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended." The Association's allegation that influence of rival organizations is responsible for its failure to gain the recognition it seeks is not supported by evidence. No other reasons for such failure have been advanced; in fact, the Association's efforts to obtain recognition as a participating

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<sup>7</sup> Section 304 of the Transportation Act of 1920, provided for the establishment of a Board to be known as the Railroad Labor Board, to be composed of nine members, including three members described as a "labor group, representing the employees and subordinate officials of the carriers."

organization, from those labor organizations which do enjoy such right of participation, have been inconclusive up to this point, and the Association apparently has not attempted to press its claim by seeking the intervention of the Secretary of Labor, as provided for in Section 3 First (f) of the Railway Labor Act.\*

### *Findings of Fact*

1. The American Railway Supervisors Association, Inc. has not established the right under Section 3, First (a) of the Railway Labor Act to participate in the selection of labor members of the National Railroad Adjustment Board.

2. The Association has not submitted clear and convincing evidence showing that the reasons for its failure to establish the right to participate in the selection of labor members of the National Railroad Adjustment Board have no relation to its being a labor organization, national in scope, and organized in accordance with the provisions of the Railway Labor Act, as amended.

3. The Association has, therefore, failed to rebut the presumption, under Section 202.15(a) of the Board's Regulations, that it is not a labor organization national in scope and organized in accordance with the provisions of the Railway Labor Act, as amended.

4. The Association, having failed to rebut that presumption, cannot be deemed to be "a railway labor or-

\* Section 3 First (f) provides for the investigation by the Secretary of Labor, in case of a dispute, of the claim of a labor organization desiring participation and, if such claim is deemed to have merit, for the appointment by the Mediation Board of an investigating board composed of a representative selected by the national labor organizations duly qualified to participate in the selection of members of the National Railroad Adjustment Board, a representative designated by the claimant, and a neutral representative designated by the Mediation Board, the findings of such investigating board to be final and binding.

ganization, national in scope, and organized in accordance with the provisions of the Railway Labor Act, as amended," within the meaning of the Act and the Board's Regulations.

### *Conclusions of Law*

The American Railway Supervisors Association, Incorporated, is not an "employer," within the meaning of the Railroad Retirement Act of 1937, as amended. It is likewise not an "employer" within the meaning of the Railroad Unemployment Insurance Act, as amended, the definition of "employer" in that Act being identical with the definition in the Railroad Retirement Act.

(Signed) W. J. KENNEDY, *Chairman*,  
(Signed) F. C. SQUIRE, *Member*,  
(Signed) HORACE W. HARPER, *Member*.



## APPENDIX F.

**Correspondence Dealing With UROC'S Attempts to  
Certify a Dispute Under Sec. 3, First (f).**

July 22, 1954

Hon. James Mitchell,  
Secretary of Labor,  
Department of Labor,  
Washington 25, D. C.

Dear Sir:

The United Railroad Operating Crafts, a railway labor union National in Scope, is desirous of being recognized for the purpose of participating in the selection of the labor members of the National Railroad Adjustment Board.

We would appreciate your proceeding to so designate us at your earliest convenience. Any information that you will require from us will be forthcoming upon request.

Sincerely

HARRY C. JOHNSON  
General Sec'y-Treas.

HCJ/mk  
oeiu-28-afl

## U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

Washington

July 29, 1954

Mr. Harry C. Johnson  
General Secretary-Treasurer  
United Railroad Operating Crafts  
608 South Dearborn  
Chicago 5, Illinois

Dear Mr. Johnson:

This is in reply to your letter requesting that the United Railroad Operating Crafts be recognized as a labor organization eligible to participate in the selection of labor members of the National Railroad Adjustment Board.

The determination of the qualifications of your organization in this matter must follow the procedure specified in Section 3 of the Railway Labor Act. I am enclosing a copy of the Act for your convenient reference. You will note that under Section 3 First (f), investigations of the merit of claims to participate are conditioned on there being a dispute of such claims.

If your organization will submit evidence relating to the existence of a dispute in this matter, I will be glad to give your request for an investigation further consideration. It would also be necessary for you to submit detailed facts regarding your organization before a determination could be made of the merits of your claim to participate.

Yours very truly,

JAMES MITCHELL  
Secretary of Labor

Enclosure

August 27, 1954

Mr. James Mitchell  
Secretary of Labor  
U. S. Department of Labor  
Washington, D. C.

Dear Mr. Mitchell:

Thank you for your letter of July 29, 1954 addressed to Mr. Harry C. Johnson, General Secretary-Treasurer of this organization in reply to his letter of July 22, 1954 wherein he contacted you relative United Railroad Operating Craft's participating in the selection of the labor members of the National Railroad Adjustment Board.

There are several points which are not quite clear to me and I would appreciate your advice on same.

Section 3 (h), First division states: "This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees."

Section 3 First (f) states: "In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate," etc.

Section 3 First (c) states: "The national labor organization as defined in paragraph (a) (national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act) of this section acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the

Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

The law specifically states that there shall be five labor members on said board and that the five organizations now sitting on the board shall prescribe the rules under which said labor members of the Adjustment Board shall be selected and that they shall select such members. No provision is made in the law for a sixth member. This would undoubtedly take an act of Congress although the act provides a method by which a labor organization other than those now having seats on said board may participate in the selections of said representatives. It does not provide by what method such representatives shall be selected. The United Railroad Operating Crafts has been accepted by the National Mediation Board as being organized in accordance with Section 2 of this act. Our organization admits members of all five crafts; brakemen, switchmen, conductors, engineers and firemen. If certified under Section 3 First (f) to participate in the selection of labor board members, would our organization be permitted the privilege of participating in the selection of all five members of said board? The Act is very indefinite on this point. Furthermore, it would seem to me impossible for a sixth organization to participate in the selection of said members whose very appointment is designated under the Act by an organization or association thereof and in accordance with its respective constitutions. Again, in the event that our organization, or any organization for that matter, is so certified to

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participate in the selection of said labor members, how, when or where would or could this be done? Please advise.

Gratefully yours,

J. P. CARBERRY  
Administrator of Affairs

JC/mb  
oeiu-28-af

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U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

Washington

September 13, 1954

Mr. J. P. Carberry  
Administrator of Affairs  
United Railroad Operating Crafts  
Transportation Building  
608 South Dearborn  
Chicago 5, Illinois

Dear Mr. Carberry:

This is in reply to your recent letter asking certain questions regarding the Railway Labor Act. The Act does not provide for administrative interpretations of its meaning, but I am glad to furnish you with general information regarding the selection of labor members of the National Railroad Adjustment Board.

Organizations desiring to participate in the selection of labor members have in the past requested recognition of their eligibility from the organizations already recognized as participants. In this connection, you may wish to



write to Mr. A. E. Lyon, Secretary of the National Railway Labor Organizations. Qualified to Participate in the Formation of the National Railroad Adjustment Board, 10 Independence Avenue, S. W., Washington, D. C., and request information regarding application for recognition.

Only in the event a dispute arises as to recognition, as you state, are procedures specified in the Act to determine eligibility. For your information, I am enclosing a copy of the latest decision of the Secretary of Labor in passing on the merit of a participation claim under section 3 First (f) of the Act, in the matter of The American Railway Supervisors Association, Inc. You will note that under the Act, this finding of the Secretary is transmitted to the National Mediation Board as a preliminary to final action of another body on the question of eligibility.

When the eligibility of a labor organization is recognized, it participates in the selection of the members of the National Railroad Adjustment Board under rules of procedure set up by the labor members, including the method of designating members of the various Divisions. You may wish also to take this matter up with Mr. Lyon. The Act does not contemplate that every organization participating in the selection of members of the Board will have a representative on the Board, since the labor membership of the Board is set at 18 and under the terms of the Act the number of organizations which may participate in the selection of members is unlimited. At the present time 25 organizations are recognized as participants.

I trust this information will be helpful to you.

Yours very truly,

JAMES P. MITCHELL  
Secretary of Labor

Enclosure

**UNITED RAILROAD OPERATING CRAFTS****TRANSPORTATION BUILDING****608 South Dearborn - Chicago 5, Illinois****Feb. 7, 1955**

**James P. Mitchell, Sec. of Labor  
U. S. Department of Labor  
Washington, D. C.**

**Dear Mr. Mitchell:**

As President of the United Railroad Operating Crafts, an Organization of Railroad Operating Employees, organized under the provisions of the Railway Labor Act, I have been instructed by our International executive Board to again advise you that our organization wishes to participate in the selection of the proper labor member of the Railway Adjustment Board, first division.

In my first notification to you of this desire which took place several months ago, you informed me that it would be necessary for me to establish the fact that an actual dispute existed between the organization. I represent and the present members of the Board. Perhaps you are aware that we have been engaged in several legal disputes which would have determined, had the Courts had jurisdiction, to decide whether or not the United Railroad Operating Crafts were National in Scope. In these disputes, all the present members of said Adjustment Board, first div, opposed our position.

The same Adjustment Board has already rendered a decision in the so called Hanson Case that the United Railroad Operating Crafts did not comply as an Organization National in Scope.

The purpose of this communication is to indicate to you that an actual dispute exists between the Organiza-

tion I represent and the majority of the present members of the Adjustment Board, first div. If I can be of any further assistance in further clarification of this matter, please advise.

Most Sincerely Yours

J. P. CARBERRY, President  
United Railroad Operating Crafts

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U. S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

Washington

March 3, 1955

Mr. J. P. Carberry, President  
United Railroad Operating Crafts  
Transportation Building  
608 South Dearborn  
Chicago 5, Illinois

Dear Mr. Carberry:

This is in reply to your recent letter regarding the request of the United Railroad Operating Crafts union to participate in the selection of labor members of the National/Railroad Adjustment Board.

Under Section 3. First (f) of the Railway Labor Act the Secretary of Labor has authority to investigate disputed claims of unions to be recognized as selectors. An investigation is not started, however, until evidence has been submitted to the Secretary showing that a dispute exists between the claimant union and the labor unions now authorized to be Board members selectors.

The decisions by the National Railroad Adjustment Board mentioned in your letter involved a different question, namely, whether your union is "national in scope" within the meaning of the union shop provision of the Act. Further, the Board's decisions would not necessarily represent the views of the labor unions qualified to select labor members of the Board.

In my previous letter to you, I enclosed a copy of the Secretary of Labor's decision of September 8, 1953, on the merit of a participating claim of the American Railway Supervisors, Inc. I believe this might be a helpful guide as to the type of evidence which would establish the existence of a dispute under Section 3. First (f). The evidence in that case included copies of requests made by the claimant union to the selector organizations for participation in selection and of the responses made to such requests.

I believe that this letter should clarify the technical jurisdictional requirements upon which my action in matters under the Railway Labor Act depends.

Sincerely yours,

JAMES P. MITCHELL  
Secretary of Labor

## RAILWAY LABOR EXECUTIVES' ASSOCIATION

A. E. Lyon, Executive Secretary-Treasurer

10 Independence Ave., S. W.

Washington 24, D. C.

July 15, 1955

Mr. J. P. Carberry, President,  
United Railroad Operating Crafts,  
Room 444, 608 South Dearborn Street,  
Chicago 5, Illinois

Dear Sir:

I have received your letter dated May 27, 1955, addressed to me as "Secretary, National Railroad Adjustment Board."

I am not and have never been secretary of the National Railroad Adjustment Board and the Board is not and has never been located in Washington, D. C., as I would assume that all persons connected with a railroad labor organization would know.

I will send a copy of your letter to the chief executive officers of the railroad labor organizations recognized as qualified to participate in the selection of the labor members of the National Railroad Adjustment Board. I assume that they will give it their attention when they hold a meeting. There is no particular form of application for recognition.

Your truly,

A. E. LYON

cc: Honorable James P. Mitchell,  
Secretary of Labor

Chief Executives of Railroad  
Labor Organizations



**NATIONALLY ORGANIZED RAILWAY LABOR  
ORGANIZATIONS**

**QUALIFIED TO PARTICIPATE IN THE FORMATION  
OF THE NATIONAL RAILROAD ADJUSTMENT  
BOARD**

September 30, 1955

Mr. J. P. Carberry, President  
United Railroad Operating Crafts  
608 So. Dearborn St.,  
Chicago 5, Illinois

Dear Sir:

By letter of May 27, 1955, you made your request that the United Railroad Operating Crafts be granted the right to participate in the selection and designation of the labor members of the National Railroad Adjustment Board. Under date of August 29, 1955, you were informed that a meeting of the executive officers of all the Nationally Organized Railroad Labor Organizations qualified to participate in the selection of labor members of the National Railroad Adjustment Board was to be held at the Hamilton Hotel, Washington, D. C., beginning at 10 A. M. on September 30, 1955, and that the meeting was called specially to consider the subject matter of your letter. You or your representative was invited to appear at the meeting and present your position.

Neither I nor any of the executive officers have received from you any communication acknowledging or referring to the invitation sent you on August 29, 1955. The meeting which you were asked to attend convened at the time and place scheduled and remained in session for a considerable time awaiting your appearance. Eighteen of the twenty-three participating organizations were

represented. You did not appear nor did any one from your organization appear on your behalf or as representing you.

Consideration of the question of whether your organization is national in scope within the meaning of Section 3 of the Railway Labor Act must be based on adequate information laid before us. We have no such information. Consequently the method we follow in securing such necessary information is that suggested to you in my letter to you of August 29, 1955, namely, that you or your representative appear at a meeting of the executive officers to present your position and evidence on which you rely.

Should you indicate your desire to appear, the matter will be considered at our next meeting.

Very truly yours,

A. E. LYON  
Secretary.

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October 7, 1955

Mr. A. E. Lyon

Railway Labor Executive Association  
10 Independence Avenue Southwest  
Washington 24, D. C.

Dear Sir:

This is in reply to your letter of September 30, 1955, wherein you advise me of the following:

No. 1—that under date of August 29, 1955, I was informed that a meeting of the Executive Officers of all the National Organized Labor Organizations qualified to par-

ticipate in the selection of Labor members of the National Railroad Adjustment Board was to be held at the Hamilton Hotel, Washington, D. C., beginning at 10:00 A. M., on September 30, 1955, and that the meeting was called especially to consider the subject matter of your letter. Also, my representative was invited to appear at the meeting and present my position.

No. 2—The meeting at which I was asked to attend convened at the time and place scheduled and remained in session for considerable time awaiting my appearance. Eighteen of the twenty-three participating organizations were represented. Neither I, nor anyone from my organization appeared at said meeting.

No. 3—Should I indicate my desire to appear at a meeting of the Executive Officers the matter will be considered at your next meeting.

In reply to Paragraph #1—I did not receive your notification of August 29, 1955 and it is rather difficult for me to believe that a special meeting of the body was called to consider the subject matter of my September 30, 1955 request.

In reply to Paragraph #2—Again, it is unreasonable for me to believe that the meeting referred to was called with no knowledge or assurance that I would put in an appearance, especially in view of the fact that eighteen of the twenty-three participating organizations had to send representatives to various geographical locations.

In reply to Paragraph #3—Apparently, your next meeting will not be a special meeting to consider the question of whether or not the organization I represent is National in scope within the meaning of Section 3 of the Labor Act. However, this particular subject matter will be considered in the event I desire to appear before the body. It is my desire to appear at your next meeting, and I suggest that notification thereof be sent to me in the same manner in which I receive your letter of September

30, 1955; namely, Registered Mail—Return Receipt Requested. I would appreciate your sending copy thereof to Mr. J. L. Norton, Chairman, U.R.O.C., National Executive Board, 455 South 12th Street, San Jose, California.

Please advise as to whether your letter of notification under date of August 29, 1955, was sent to me, Registered Mail, Return Receipt Requested.

Very truly yours,

J. P. CARBERRY, President  
United Railroad Operating

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**NATIONALLY ORGANIZED RAILWAY LABOR  
ORGANIZATIONS**

**QUALIFIED TO PARTICIPATE IN THE FORMA-  
TION OF THE NATIONAL RAILROAD ADJUST-  
MENT BOARD**

10 Independence Avenue, S.W.  
Washington 24, D. C.  
October 18, 1955

Mr. J. P. Carberry, President  
United Railroad Operating Crafts  
608 South Dearborn Street  
Chicago 5, Illinois

Dear Sir:

I have received your letter of October 7. I am sending a copy of it to all those who are shown as getting a copy of this answer.

Another copy of my letter of August 29, which was addressed jointly to you and Mr. Michael Quill, is enclosed. We are certain that the letter left this office in the regular mail. It was not sent registered mail.

I assume that in due time another meeting of the organizations will be held to consider your application and you will be notified.

Yours truly,

S/ A. E. LYON  
Secretary

cc: Chief Executives of Nationally Organized  
Railway Labor Organizations Qualified to  
Participate in the formation of the  
National Railroad Adjustment Board

Mr. C. M. Mulholland

Mr. H. Heiss

Mr. H. N. McLaughlin



MOTION FILED SEP 28 1956

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**In the Supreme Court of the United States**

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**OCTOBER TERM, 1956.**

**No. 56.**

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**PENNSYLVANIA RAILROAD COMPANY and  
BROTHERHOOD OF RAILROAD TRAINMEN,**

*Petitioners,*

**vs.**

**N. P. RYCHLIK,**

**Individually and on Behalf of and as Representative  
of Other Employees of The Pennsylvania Railroad,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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**MOTION OF BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS FOR LEAVE TO FILE  
BRIEF AS AMICUS CURIAE**

**and**

**BRIEF OF AMICUS CURIAE.**

---

**CLARENCE E. WEISELL,  
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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1956.**

**No. 56.**

**PENNSYLVANIA RAILROAD COMPANY and  
BROTHERHOOD OF RAILROAD TRAINMEN,**

*Petitioners,*

**vs.**

**N. P. RYCHLIK,**

**Individually and on Behalf of and as Representative  
of Other Employees of The Pennsylvania Railroad,**

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.**

## **MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.**

Now comes Brotherhood of Locomotive Engineers and respectfully moves the Court for leave to file a brief amicus curiae in the above entitled cause, and as grounds therefor respectfully shows:

This Brotherhood states that it is a railway labor organization representing railway employees in engine service, principally locomotive engineers, and that through its General Committees of Adjustment it is the craft representative of locomotive engineers on approximately 98% of the mileage of the principal railroads of the United States.

Section 2, Eleventh, of the Railway Labor Act is the so-called Union Shop Amendment of the Act which be-



came effective January 10, 1951, and paragraph (c) thereof (45 U. S. C. 152, Eleventh (c)) relates specifically to railroad employees in engine, train, yard or hostling service. The interpretation and construction of said paragraph (c) is of particular and vital importance to employees in engine service and to this Brotherhood as the representative of such employees. The construction of the Railway Labor Act and its effect upon the Union Shop Amendment thereof as made by the court below is directly opposed to the interests of this Brotherhood as a union representing railroad employees in engine service.

The Brotherhood wishes to file a brief in support of the contention that the Railway Labor Act provides an adequate administrative remedy for determining whether a labor union is national in scope and organized in accordance with the Act for the purposes of the Union Shop Amendment of that Act.

The Brotherhood of Railroad Trainmen, one of the petitioners for the writ of certiorari herein, which petition was granted by the Court, asserted the above contention in said petition, and the brief of this Brotherhood would be in support of such position of the Brotherhood of Railroad Trainmen.

The Brotherhood of Locomotive Engineers does not at this time know what arguments and authorities the petitioners will present on the merits of the case as contended for by it, but believes that the argument to be presented by this Brotherhood would be supplemental and in addition to arguments presented by the Brotherhood of Railroad Trainmen. This Brotherhood at present is a defendant in litigation now pending within the Second Circuit in the United States District Court for the Southern District of New York which involves questions similar, and in some respects substantially identical, to questions

presented in the instant litigation, and for that reason is especially interested in the instant case.

Written consent of the petitioners to the filing of this brief has been obtained and is herewith filed with the Clerk of this Court. Consent of the respondent to the filing of this brief was refused.

Dated at Cleveland, Ohio, this 21st day of September, 1956.

CLARENCE E. WEISELL,  
HAROLD N. McLAUGHLIN,

1706 Union Commerce Building,  
Cleveland 14, Ohio,

*Attorneys for Brotherhood  
of Locomotive Engineers.*

# In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 56.

PENNSYLVANIA RAILROAD COMPANY and  
BROTHERHOOD OF RAILROAD TRAINMEN,

*Petitioners,*

vs.

N. P. RYCHLIK,

Individually and on Behalf of and as Representative  
of Other Employees of The Pennsylvania Railroad,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE  
ENGINEERS AS AMICUS CURIAE.

## STATEMENT.

This brief is filed on behalf of the Brotherhood of Locomotive Engineers (hereinafter sometimes called "Brotherhood" or "BLE"), which is a labor organization in the railroad industry, national in scope and organized in accordance with the Railway Labor Act. As such it participates in the selection and designation of members of the National Railroad Adjustment Board in accordance with the provisions of Section 3, First, of the Railway Labor Act (45 U. S. C. 153, First). It has one representative on the First Division of the National Railroad Adjustment Board.

Since the enactment of the Union Shop Amendment to the Railway Labor Act, effective January 10, 1951 (45 U. S. C. 152, Eleventh), numerous union shop agreements have been negotiated with the carriers by General Committees of Adjustment of the Brotherhood. Members of the Brotherhood in the employ of railroads are all engaged in engine service, and the Brotherhood of Locomotive Engineers is the craft representative of locomotive engineers on approximately 98% of the mileage of the principal railroads of the United States. In 45 U. S. C. 152, Eleventh (c), it is provided that

"The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h), of this Act (45 U. S. C. 153, First (h)) defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services: \* \* \*"

The question of the determination of whether an organization which is not the craft representative meets the requirements of the section quoted, that is, whether such organization is national in scope and organized in accordance with the Railway Labor Act, is of great importance to this Brotherhood. This brief is directed to a consideration of such question.

From the complaint, the affidavit and exhibits attached thereto, the following pertinent facts appear:

Petitioners, Brotherhood of Railroad Trainmen (BRT) and Pennsylvania Railroad Company, on March 26, 1952, and effective April 1, 1952, entered into a union shop agreement as authorized by Section 2, Eleventh, of the Railway Labor Act (45 U. S. C. 152, Eleventh) (R. 12). This agreement provided that all employees in the classes represented by BRT would be required to be members of that organization within sixty days (R. 13), but further provided, as required by Section 2, Eleventh (c) of the Railway Labor Act, that such membership requirement would not be applicable to employees "who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees of a craft or class in engine, train, yard, or hostling service," and that nothing contained in the agreement should "prevent an employee from changing membership from one organization to another organization admitting to membership employees of the craft or class in any of the said services" (R. 13).

Respondent Rychlik had been a member of the BRT but resigned from that membership in February 1953 and became a member of United Railroad Operating Crafts (UROC) which respondent "fully believed, in good faith, to be a railroad union national in scope" (R. 10). Respondent later, on July 31, 1954, became a member of the Switchmen's Union of North America, "a union which is uniformly recognized as being national in scope, as that term is employed in the Railway Labor Act" (R. 5, 11). In accordance with the provisions of paragraph 5(a) of the Union Shop Agreement (R. 14), respondent, "some time after February of 1953," was cited for non-compliance with the membership requirements of the Union Shop



Agreement (R. 10). He was given a hearing with respect thereto on August 27, 1953 (R. 10), at which time the hearing was postponed "until such time as there might be a more conclusive determination as to whether the said UROC was in fact a union national in scope" (R. 11). A further hearing was had on August 23, 1954, at which time respondent "gave evidence of the fact" that he had been a member of the Switchmen's Union since July 31, 1954 (R. 11).

The aforementioned hearings were held before the System Board of Adjustment (R. 10, 11), provided for in paragraph 7 of the Union Shop Agreement, which Board was composed of four members, of whom two were appointed by the petitioner carrier and two by the BRT (R. 15).

By letter dated January 3, 1955 from the System Board of Adjustment, respondent was informed that "following thorough review, consideration and discussion of the evidence," the Board concluded "that membership in the United Railroad Operating Crafts does not constitute compliance with the Union Shop Agreement," and that the decision of the Board was that respondent "has not complied with the membership requirement for continued employment as set forth in the Union Shop Agreement effective April 1, 1952" (R. 17, 18). Under date of January 14, 1955, the carrier's superintendent advised respondent that, in accordance with the decision of the System Board of Adjustment, respondent's service would be terminated as of January 14, 1955 (R. 18).

The District Court, upon motion of the petitioners, dismissed the complaint upon the ground that it failed to state a cause of action (R. 36). In the opinion of the District Court (R. 22 ff), reported 128 F. Supp. 449, it was

held that the Union Shop Agreement was not invalid by reason of the fact that it provided for a System Board consisting of two representatives from the carrier and two from the BRT; that there was no allegation in the complaint or proof submitted that there had been any discrimination against respondent by any member of the Board. It stated that the Act contemplated continued membership in a qualified union and that that question was one for proper determination in the first instance by the System Board of Adjustment; that it was not necessary for the Court to decide upon the facts submitted whether UROC is a labor organization national in scope, and then stated that under the Railway Labor Act the function of deciding such question is left to special specific administrative procedure provided in Section 3 of the Act (45 U. S. C. 153, First (f)), reading as follows:

"In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring par-

participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding."

The United States Court of Appeals for the Sixth Circuit, in *Pigott v. D. T. & I. R. R. Co.*, 221 F. 2d 736, affirming the District Court for the Eastern District of Michigan in the similarly entitled case (116 F. Supp. 944), a case substantially identical to the instant case in its fact situation, held similarly (p. 740) that "whether a labor organization is 'national in scope' is well suited to administrative definition," and that the determination by a three-man board, provided for in Section 3, First (f), of the Railway Labor Act, would be conclusive as to whether a union has the right to select members of the National Railroad Adjustment Board, and that such determination would have a prospective universal application, including application to the union shop provision of the Act dealing with the question of whether a union was national in scope.

Although it was claimed in the *Pigott* case, as here, that a hearing before a System Board, composed in part of representatives of the union, did not afford due process, the Court of Appeals for the Sixth Circuit held that there was no denial of due process since there was available the remedy provided in Section 3, First (f), for determining whether a union was national in scope.

A similar view was taken by the United States Court of Appeals for the Seventh Circuit in the case of *UROC v. Pennsylvania RR. Co.*, 212 F. 2d 938.

In the instant case the United States Court of Appeals for the Second Circuit (229 F. 2d 171) disagreed

with the decisions of the Courts of Appeals for the Sixth and Seventh Circuits and held that the administrative procedure of Section 3, First (f), of the Act was not an adequate remedy.

### QUESTIONS PRESENTED.

Petitioners and respondent do not agree upon a statement of the questions presented for determination in this case. From a consideration of the record herein and the statements of the questions presented as made by counsel for opposing parties, this Brotherhood believes the substantial question for determination herein is whether the administrative method provided in Section 3, First (f), of the Railway Labor Act (45 U. S. C. 153, First (f)) for deciding eligibility to participate in the selection and designation of the labor members of the National Adjustment Board, is also the proper and exclusive method for determining whether an organization is national in scope and organized in accordance with the Railway Labor Act as required by the provisions of the Union Shop Amendment.

This brief supports the view that Section 3, First (f), of the Railway Labor Act provides an available and adequate administrative remedy for determining this question.

**SUMMARY OF THE ARGUMENT.**

When a union shop agreement authorized by the 1951 amendment of the Railway Labor Act has been entered into between a carrier and the representative of a craft of operating employees, all employees in the craft are required to become members of the craft union or of another union admitting members of such craft which is national in scope and organized in accordance with the Railway Labor Act. The phrases "national in scope" and "organized in accordance with the Act" in the 1951 amendment are identical with phrases used in the 1934 amendment of the Act, which 1934 amendment also provided an administrative method for determination of whether a union was national in scope and organized in accordance with the Act for the purposes of the 1934 amendment. A union found to be national in scope for the purposes of that amendment would also be national in scope for the purposes of the Union Shop Amendment.

This administrative procedure affords a conclusive method of determination of the status of the union, and since it is available to any union claiming to come within the provisions of the Act for the purpose of choosing members of the National Railroad Adjustment Board, it should be held to be the method for determination whether a union is national in scope for the purposes of the Union Shop Amendment to the exclusion of such determination by the courts. The Act should be read as a whole to the end that when an organization is found to be national in scope it shall be such for all purposes of the Act. The exclusive method of 153, First (f), will accomplish this. Judicial determination for purposes of the Union Shop Amendment alone will not do so.

The use of the administrative method is in accord with the purposes of the Railway Labor Act, and in accord with



decisions of this Court that resort should not be had to the courts to settle disputes under the Railway Labor Act when an administrative remedy is available or unless there is an explicit judicial remedy.

### ARGUMENT.

**The decisions of this Court hold that when there is available an adequate administrative remedy such remedy excludes jurisdiction of the courts.**

It is no novelty in legal procedure for courts to refuse to grant relief to litigants who have failed to exhaust available non-judicial remedies. When members of clubs, religious organizations, labor unions or fraternal societies have complained of grievances arising within such organizations, and where the rules or laws of such organizations provide a method for redress of the grievances within the organizations, courts have consistently refused to decide such controversies when members have failed to seek the redress provided by the organizations' laws or tribunals. *International Union of Steam and Operating Engineers, et al. v. Owens*, 119 O. S. 94; *Engel v. Walsh*, 258 Ill. 98; *Puleio v. Sons of Italy, etc.*, 266 Mass. 328. Even when such remedies have been pursued within the organizations the courts have refused to interfere with the decisions of the organizations' tribunals in the absence of fraud, collusion, bad faith, or arbitrariness. *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U. S. 1.

Where there is a prescribed statutory administrative remedy this Court has held that judicial relief will not be granted until such administrative remedy has been exhausted, even where contention is made that the administrative body lacked power over the subject matter. *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 51.

With respect to administrative remedies provided in

the Act here involved, to wit, the Railway Labor Act, this Court has held that the administrative remedy to be found in the National Railroad Adjustment Board excludes a court from deciding grievances. *Order of Railway Conductors v. Pitney*, 326 U. S. 561; *Slocum, etc. v. D. L. & W. R. Co.*, 339 U. S. 239; *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255. Claimants, who choose to submit their grievances to an established tribunal, are required to present them to the Adjustment Board rather than to the courts, although the language of the Railway Labor Act appears to be permissive rather than mandatory. In 45 U. S. C. 153, First (i), it is provided that after the handling of disputes in the regular manner with the officer of a carrier the disputes "may be referred" to the Adjustment Board. Thus it appears that it is the existence of an available remedy rather than a specific requirement that the remedy must be pursued which excludes the jurisdiction of the courts in such matters.

Further, with respect to the provision of the Railway Labor Act (45 U. S. C. 152, Ninth) where the National Mediation Board has the duty of certifying the designation of a craft representative and is given the authority to take a secret ballot of employees involved for the purpose of determining representation and, of designating who may participate in the election, this Court has held that such determination by the National Mediation Board is not reviewable by the courts. *Switchmen's Union of North America, etc. v. National Mediation Board*, 320 U. S. 297.

As we understand various expressions of this Court in the cases of *Switchmen's Union, etc. v. National Mediation Board*, *supra*, *General Committee, BLE v. M. K. T. R. Co.*, 320 U. S. 323, and *General Committee, BLE v. Southern Pacific Co.*, 320 U. S. 338, all of which cases were

decided at the same time, they are to the general effect that Congress, in the absence of a plain statutory remedy, did not intend to have the courts resolve disputes in the railroad industry and particularly those arising under the Railway Labor Act. Thus it is said in *General Committee, BLE v. M. K. T. R. Co. supra*, at p. 333:

"The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

And again at p. 337:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied."

Certainly no specific judicial remedy is set forth in the Railway Labor Act for deciding the question of whether a labor union is national in scope. On the contrary, a specific administrative remedy is provided in the Act for determining that question. (45 U. S. C. 153, First (f).) The method is there provided for a decision by a Board of three, one to be chosen by each of the interested parties and the third or neutral member to be chosen by the National Mediation Board, it is substantially identical with the method chosen for determination of disputes by arbitration. Its fairness has not been questioned, and we believe is not open to question.

The administrative procedure of 45 U. S. C. 153, First (f), is a rational and adequate method for determining whether a union is national in scope for the purposes of agreements made under the Union Shop Amendment.

The Court of Appeals for the Sixth Circuit in *Pigott v. D. T. & I. R. R. Co.*, 221 F. 2d 736, found the administrative procedure of 45 U. S. C. 153, First (f), for a determination of whether an organization is national in scope and organized in accordance with the Act by a board of three, the neutral member of which is to be appointed by the National Mediation Board, to be an available and adequate remedy to determine whether a labor organization is national in scope for purposes of the Union Shop Amendment (45 U. S. C. 152, Eleventh). The Court of Appeals for the Second Circuit in the instant case did not agree with the conclusion of the court for the Sixth Circuit.

In order that an organization may participate in the selection of members of the National Railroad Adjustment Board it must be "national in scope" and "be organized in accordance with the provisions of Section 2" of the Act (45 U. S. C. 153, First (a) ). In order that an operating employee who is not a member of the union holding the representation of the craft on a carrier, may meet the union membership requirements of the Act and of the agreement in this case, he is required to hold membership "in any one of the labor organizations, national in scope, organized in accordance with this Act" which admits to membership employees in one of the operating crafts or classes (45 U. S. C. 152, Eleventh (c) ). When a dispute arises as to whether an organization is eligible to participate in the selection of members of the Adjustment Board, such dispute may be decided by a board of three, one chosen by each of the interested parties and the third, or



neutral, member chosen by the National Mediation Board, and the persons so chosen, constituting a board of three "shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with Section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding" (45 U. S. C. 153, First (f)). Since by the requirements of Section 153, First (a), an eligible organization must be national in scope, this requirement will likewise apply to any elector found eligible by the board of three. Thus, the eligibility requirements of both Sections 152, Eleventh (c) and 153, First (a) and (f), are substantially alike.

The Court of Appeals for the Second Circuit (221 F. 2d 171, 174) purported to find that in the event the procedure of Section 153, First, should be followed with respect to union eligibility under the Union Shop Amendment, and a negative finding should be made by the board of three, such board might fail to make a specific finding that the union was not national in scope, so that it would be "impossible to know whether this fact was itself ground for refusal."

The reasoning and conclusion of the court appear to us to be unrealistic. Since the requirements of Section 153 for eligibility in participation of selection of the Adjustment Board are specific that an eligible organization must be national in scope and organized in accordance with the Act, it is inconceivable that the board of three, if it denied eligibility, would fail to state that the Union was not national in scope or was not organized in accordance with the Act. The board of three is required to "in-



investigate the claims of the labor organization desiring participation and to decide whether or not it was organized in accordance with Section 2 of the Act." No investigation worthy of the name would fail to disclose whether the applicant organization was national in scope and organized in accordance with the Act. Since two of the members of the board of three would be partisan members, the claims of both sides on all points involved in eligibility would be fully presented. The Board would be required to inquire into whether the organization was national in scope because Section 153, First (f) of the Act requires the Board to determine not only whether the applicant Union is organized in accordance with Section 152 but also whether it is "otherwise properly qualified to participate in the selection of labor members." Since there would be opposing contentions before the Board we think it would be practically impossible to give any substance to a view that the Board would not state its reasons with respect to whatever decision it might render.

The Second Circuit Court of Appeals also purported to see a defect in the remedy of 153, First (f), in the possibility that the "competing" union might not wish to be an elector of members of the Adjustment Board and therefore the employee would have no recourse under that remedy if the competing union saw fit not to apply for such eligibility. It would appear to us that if the so-called competing union would be so little interested in using available procedure to have itself declared an eligible union to meet the requirements of the Union Shop Amendment it would not be such an organization that the member should ever have placed any trust therein. Employees who have so little interest in their own welfare that they are willing to risk their all with respect to employment on an organization so faithless that it will not seek to protect the interest of its members are not entitled to the protec-

tion of the court. As was said by the United States District Court for the District of Maryland in *Alabaugh v. Baltimore and Ohio Railroad Company, et al.*, 125 F. Supp. 401, 407, aff. 222 F. 2d 861, cert. den. 350 U. S. 839:

"Plaintiffs voluntarily stopped paying dues to Brotherhood (BLE) and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). They could have hedged their bet by continuing to pay dues to Brotherhood after joining UROC, pending determination of UROC's status. If they had continued to pay dues to Brotherhood, that union might have expelled them for dual unionism, but B & O could not have discharged them, in view of the provisions of section 152 Eleventh (c). They would have continued in their employment as 'free riders.' But they chose to stake all on UROC."

The method of 153, First (f), for determining whether a union is national in scope is a sure and certain method for obtaining uniformity on that point. If the matter of such determination is for the National Railroad Adjustment Board, or system boards as to those carriers where such boards are established, there is likelihood of diversity of view on this vital and fundamental point. If the qualification of "national in scope" is definitely determined under 153 First (f), there are still other points which would be left for determination by system boards or the National Railroad Adjustment Board which would apply specifically to the individual cases, as for example, whether the employee was in good standing in his union, whether

he had become a member of a union within the required time, or whether he had lost membership for reasons other than non-payment of dues, etc. There should be no variation in the fundamental condition whether the union in which the employee claimed to be a member met the requirements of the Act. Only the circumstances applicable to a particular individual's case should be left for determination by the Boards. Resort to the statutory remedy of 153, First (f), will solve all of the problems as to the eligibility of a union with respect to union membership requirements, and since it is available to all organizations which seek to compete in this field it should be held that the method set up in that section of the statute is an applicable and exclusive method for determining the basic question of whether an organization is national in scope and organized in accordance with the Railway Labor Act.

**The legislative history and the proper construction of the Railway Labor Act support the contention that the method for determining whether a union is national in scope and organized in accordance with the Railway Labor Act as provided in 45 U. S. C. 153, First (f), is the exclusive method for determining the same matters with reference to the Union Shop Amendment (45 U. S. C. 152, Eleventh (c)).**

Section 3 of the Railway Labor Act (45 U. S. C. 153) was one of the 1934 amendments to that Act. By this section there was first established the National Railroad Adjustment Board for the settlement of claims and grievances between carriers and their employees. The composition of that Board and the method of selecting members of that Board were specified in the section. Membership of the Board and of each Division thereof is to be divided equally between carrier representatives and labor representatives. The labor members are to be chosen

by "such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act" (45 U. S. C. 153, First (a) ). The First Division of the Board has jurisdiction over disputes involving engine, train and yard service employees and includes engineers and firemen. It consists of ten members, five of whom "shall be selected and designated by the national labor organizations of the employees" (45 U. S. C. 153, First (h) ). In event of dispute as to eligibility to participate in the selection of the labor members determination of eligibility is provided for in 45 U. S. C. 153, First (f) and, as hereinbefore mentioned, provides for a final decision on this matter by a board of three, provided that the Secretary of Labor has first investigated the claim of an applicant labor organization and has recommended that the claim has merit. The board of three is composed of one representative chosen by the national labor organizations already qualified, one representative chosen by the claimant, and a third neutral representative chosen by the National Mediation Board. The board of three is to decide whether or not the claimant "was organized in accordance with Section 152" of the Act and "is otherwise properly qualified to participate in the selection of labor members of the Adjustment Board." Hence the board of three is to decide whether the claimant is organized in accordance with Section 152 of the Act and is national in scope as required by Section 153, First (a).

The same phrases, to wit, "national in scope" and "organized in accordance with this Act" are found in the Union Shop Amendment effective January 10, 1951 (45 U. S. C. 152, Eleventh (c) ). There is no new method provided in the Union Shop Amendment for determining what is meant by "national in scope" or "organized in ac-



cordance with the Act." The only reasonable conclusion, therefore, appears to be that when Congress used the same terms in the later Amendment, it intended the same meaning for them as used in the earlier amendment and the same methods provided therein for determining organization eligibility within those terms. As was pointed out by the District Court in *Pigott v. D. T. & I. R. R. Co.*, 116 F. Supp. 949, 952:

"However, Section 152, Eleventh, is silent as to the manner in which these qualifications are to be determined. On the other hand, Section 153 establishes a specific administrative procedure for that purpose. There is a compelling inference that, when the identical qualifications of Section 153 were incorporated into Section 152, Eleventh, the drafters of this amendment also had the administrative procedure of Section 153 for determining these qualifications clearly in mind."

One of the principal reasons for the adoption of the Union Shop Amendment was the desire and intention of the proponents of the amendment to have all workers in the crafts pay their proportionate cost of the activities of the unions which resulted in benefits to all employees alike whether members of the organizations or not. Up to the time of the Union Shop Amendment the cost of union activities had been borne entirely by the membership of the unions but all increases in pay and improvements in working conditions were enjoyed by non-members who thus became and are often known as "free riders."

One of the principal spokesmen before the committees of Congress in favor of the adoption of the Union Shop Amendment was George M. Harrison, President of the Brotherhood of Railway and Steamship Clerks, Freight



Handlers, Express and Station Employees. He appeared before the committees of both the Senate and the House of Representatives. In his statement on H. R. 7789 before the Committee on Interstate and Foreign Commerce of the House of Representatives, 81st Congress, 2d Session, Mr. Harrison testified, beginning at page 10 of the Report of the Hearings:

"Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of these activities without contributing anything to the cost. This is especially true when the collective-bargaining representative is one from whose existence and activities he derives most important benefits and one which is obligated by law to extend these advantages to him."

"Furthermore, collective bargaining to the railroad industry is more costly from a monetary standpoint than that carried on in any other industry. The administrative machinery is more complete and more complex. The mediation, arbitration and Presidential Emergency Board provisions of the Act, while greatly in the public interest, are very costly to the unions. The handling of agreement disputes through the National Railroad Adjustment Board also requires expense which is not known to unions in outside industry."

This reason for enactment of the amendment was conveyed to the Congress as shown in the remarks of Congressman Linehan, a member of the Committee on Interstate and Foreign Commerce in the debate which occurred just shortly prior to the passage of the amendment by the House. His remarks were in part as follows:

"Mr. Speaker, I believe that the principle of the union shop—as embodied in the proposed legislation before us—is 100 per cent American.

"It reflects the American spirit of fair play. It provides that those who accept the benefits secured by an organization shall also share equally in the expense of operating such organization.

"'Free riders'—those who seek to get something for nothing, are resented in every walk of life, and justly so. We all believe no man should shirk his responsibility. \* \* \*

"This measure is the very essence of democracy. It encourages 100 per cent membership and 100 per cent participation in the activities of the union. \* \* \*

"This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the 'free riders' in their midst—the men who take the gains which unions win through long and costly struggles but refuse to pay one penny towards the expense involved." (96 Cong. R. 17058.)

It thus appears that it was the intention of the Congress, in adopting the Union Shop Amendment, to permit agreements requiring all employees in a craft to share proportionately in the cost of administering the provisions of the Railway Labor Act concerning the craft. This view was adopted and approved by the District Court and by the Court of Appeal for the Sixth Circuit in the *Pigott* case. The Court of Appeals quoted the District Court (221 F. 2d, at 741):

"This result is consonant with the intention of the drafters of the Union Shop Amendment that a labor organization shall not be entitled to enlist employees on the basis of the privileged standing accorded to qualified unions in Section 152, Eleventh, until it has assumed its fair share of the burdens

and responsibilities attendant upon the administration of the Act,"

and then added:

"\* \* \* including the considerable financial burden required of the labor organizations participating in the administrative machinery of the Railway Labor Act."

The Court of Appeals then quoted the District Court further:

"Thus, a labor organization must exert itself, at least to the extent of participation in the Adjustment Board machinery, before it is so entitled."

The conclusion thus seems mandatory that the phrases "national in scope" and "organized in accordance with the Act" include the requirement that such a union shall be required to assume its duty of establishing its eligibility to participate in the selection of members of the National Railroad Adjustment Board. Before it has so established its eligibility, it has not assumed its due responsibility under the Act, and it cannot be said to be national in scope and organized in accordance with the Act. To conclude otherwise would create an immunization of the "free rider" status of the members of such a non-participating labor organization, and thus defeat the underlying principle of the Union Shop Amendment.

There is no valid reason for assuming that Congress intended to have any different meaning given in the union shop amendment to the concept of "national in scope" and "organized in accordance with the Act" from the meaning given thereto in the 1934 amendments to the Act (Cf. *Atlantic Cleaners and Dyers v. United States*, 286 U. S. 427, 433), and hence, as the District Court said in the *Pigott* case, there is a compelling reason for concluding that the determination of whether an organization

is national in scope within the intent of the union shop amendment is to be made by the same method provided in the 1934 amendment in Section 153, First (f), of the Act.

In 1 *Sutherland on Statutory Construction*, 3rd Edition, Section 1934, p. 430, it is said:

"In accordance with the general rule of construction that a statute should be read as a whole, as to future transactions, the provisions introduced by the amendatory act should be read together with the provisions of the original section that were re-enacted in the amendatory act or left unchanged thereby, as if they had been enacted as one section. Effect is to be given to each part, and they are to be interpreted so that they do not conflict. If the new provisions and the re-enacted or unchanged portions of the original section *cannot be harmonized* the new provisions should prevail as the latest declaration of the legislative will. In the absence of express evidence to the contrary, the new provisions are applicable only to the unchanged portions of the original section, *and have the same scope.*" (Emphasis supplied.)

And in Section 1935, p. 432, it is said:

"Words used in the unamended sections are considered to be used in the same sense in the amendment. And accordingly, a change in phraseology indicates a change in meaning. The legislature is presumed to know the prior construction of the original act or code, and if previously construed terms in the unamended sections are used in the amendment, it is indicated that the legislature intended to adopt prior construction as to the terms used in the amendment."

In *Kepner v. United States* (1904) 195 U. S. 100, 124, this Court said:

"It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is



presumed to be used in that sense by the legislative body."

While it does not appear that "national in scope" and "organized in accordance with this Act" had at the time of the enactment of the Union Shop Amendment been judicially construed, there is nothing to be found in the discussion in Congress by the proponents of the bill or others which would indicate that these phrases were not to be used in the same sense in which they had been used in the 1934 amendment. Since the identical phraseology is used, and since a method had been provided in the 1934 amendment for a determination of whether a union met these requirements, we believe logic and reason require the conclusion heretofore reached by the Courts of Appeals for the Sixth and Seventh Circuits that the method of Section 153, First (f), should be followed in determining union eligibility under the Union Shop Amendment. So to construe the Act is "to read (the Act) as a whole."

Among the primary general purposes of the Railway Labor Act as set forth in Section 2 thereof (45 U. S. C. 152) are the following:

"(2) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions.

(5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions."

Congress intended the Act to be "an instrument of peace rather than of strife." *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 570.

To leave the question of whether a union is national in scope to be determined by the courts in each individual



case of alleged non-compliance with the Union Shop Amendment is to promote strife and injure morale among employees. Constant, or at least frequent, litigation over that point would continue to be the result of that course. On the other hand, to use the available method of Section 153, First (f) will "remove a major source of irritation and unrest" and avoid strife. A firm understanding that the provisions of Section 153, First (f) form a required procedure for determining whether a union is national in scope will definitely promote and "enhance peace on the rails."

It was well known to the members of the committees of the Senate and House of Representatives which were considering the amendment just what type of organization was included in the phrases "national in scope" and "organized in accordance with the Act," and this was particularly true with reference to the operating organizations which were specifically identified to the committees in the testimony of witnesses and to the Congress in the course of the debates. These organizations were identified by name as the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railroad Conductors of America, Brotherhood of Railroad Trainmen, and Switchmen's Union of North America (Hearings on H. R. 7789, *supra*, p. 35) all of which were known to be organized on a national scale and completely free in their organization of any influence on the part of the carriers. Not only are they and were they organized on a national scale with respect to their membership but they likewise held, and hold, substantially all of the craft representation in the operating crafts on the principal railroads of the United States (Twentieth Annual Report of National Mediation Board p. 31).

In dealing with these organizations carriers were well

aware, from long experience, that they came within the requirements of "national in scope" and "organized in accordance with the Act." It could not have been the intention of Congress to impose on the carriers a duty to negotiate concerning union shop agreements which provided for membership in organizations national in scope but not acting as craft representative without providing a method for determining whether such organizations were national in scope. Since a complete and adequate method was already found in the Act, there was no need for a further provision in the union shop amendment concerning such determination.

Section 153, First (f), provides a method of determination uniform in effect. A method of determination by the judicial process would give rise to a hodge-podge of results. If the determination were open to the courts it would be possible and probable to have a particular organization found national in scope in one circuit while at the same time it was found not to be national in scope in another circuit. Similarly, the same organization might be found in different circuits and at different times to be national in scope or not national in scope. The provisions of Section 153, First (f), afford a method for a single determination which would remain in effect throughout the entire country until a change had been made under the same provisions by a subsequent proceeding.

Upon general principles of consideration of the legislative developments, and particularly in the light of the expressions of this Court to the effect that the judicial remedy should not be invoked when an adequate remedy is to be found in the Act, we submit that the remedy of Section 153, First (f), should be held to be the exclusive method for determination of the question presented in this litigation.

**CONCLUSION.**

Respondent of his own election chose to risk his employment rights by giving up membership in a union recognized as national in scope for membership in a union which had not qualified under the administrative procedure as national in scope and was not in compliance with the terms of the Union Shop Amendment.

The decision of the Court of Appeals for the Second Circuit should be reversed, and the decision of the District Court dismissing the complaint for failure to state a claim upon which relief could be granted should be affirmed and reinstated.

Respectfully submitted,

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**APPENDIX.****Pertinent Provisions of Railway Labor Act  
45 U. S. C. 151 ff.****"GENERAL PURPOSES.****"Sec. 152.**

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"Sec. 152. Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect

to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

“(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

“(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act



and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

"Sec. 153. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"Sec. 153. First (f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and

designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

"Sec. 153. First. (h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees."

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1956

No. 56

PENNSYLVANIA RAILROAD COMPANY AND  
BROTHERHOOD OF RAILROAD TRAINMEN,

*Petitioners,*

vs.

N. P. RYCHLIK, INDIVIDUALLY AND  
ON BEHALF OF AND AS REPRESENTATIVE  
OF OTHER EMPLOYEES OF THE  
PENNSYLVANIA RAILROAD,

*Respondent.*

On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE  
AND BRIEF OF THE RAILWAY LABOR EXECUTIVES'  
ASSOCIATION AS AMICUS CURIAE.**

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Dated at Toledo, Ohio, this  
28th day of September, 1956.

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1956

---

**No. 56**

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PENNSYLVANIA RAILROAD COMPANY AND  
BROTHERHOOD OF RAILROAD TRAINMEN,

*Petitioners,*

vs.

N. P. RYCHLIK, INDIVIDUALLY AND  
ON BEHALF OF AND AS REPRESENTATIVE  
OF OTHER EMPLOYEES OF THE  
PENNSYLVANIA RAILROAD,

*Respondent.*

---

On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit

---

**MOTION OF THE RAILWAY LABOR EXECUTIVES'  
ASSOCIATION FOR LEAVE TO FILE BRIEF  
AS AMICUS CURIAE**

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**On Writ of Certiorari to the United States Court of  
Appeals for the Second Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE**

The Railway Labor Executives' Association respectfully moves the Court for leave to file a brief as *amicus curiae* in the above entitled action, consent to the filing of such brief having been requested from all parties hereto, and having been refused by the respondent. In support of such motion applicant represents to the Court as follows:

The Railway Labor Executives' Association is a voluntary unincorporated association, with which are affiliated the following standard international railway labor organizations:

American Train Dispatchers' Association  
Brotherhood of Locomotive Firemen and Enginemen  
Brotherhood of Maintenance of Way Employes  
Brotherhood Railway Carmen of America  
Brotherhood of Railroad Signalmen of America



Brotherhood of Railway and Steamship Clerks,  
 Freight Handlers, Express and Station Employees  
 Brotherhood of Railroad Trainmen  
 Brotherhood of Sleeping Car Porters  
 Hotel & Restaurant Employees and  
 Bartenders International Union  
 International Association of Machinists  
 International Brotherhood of Boilermakers, Iron Ship  
 Builders, Blacksmiths, Forgers and Helpers  
 International Brotherhood of Electrical Workers  
 International Brotherhood of Firemen & Oilers, Help-  
 ers, Roundhouse & Railway Shop Laborers  
 International Organization Masters, Mates & Pilots  
 of America  
 National Marine Engineers' Beneficial Association  
 Order of Railway Conductors and Brakemen  
 Order of Railroad Telegraphers  
 Railway Employees' Department, AFL-CIO  
 Railroad Yardmasters of America  
 Sheet Metal Workers' International Association  
 Switchmen's Union of North America

The principal office of said Association is located at 401 Third Street, N.W., Washington 1, D. C.

The foregoing organizations affiliated with the Railway Labor Executives' Association represent, for purposes of collective bargaining under the Railway Labor Act, more than one million railroad employees. Each of said affiliated organizations is a party to collective bargaining agreements between it and nearly every railroad in the United States, governing the rates of pay, rules and working conditions of said employees. Said organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

The issues in this case are of direct and vital concern to these organizations. Practical nullification of the benefits intended by Congress in its removal of previous statutory inhibitions against union security agreements is

threatened. Also at stake is the ability of these organizations to continue to fulfill their aforementioned statutory duties, through utilization of the procedures for settlement of disputes and grievances which were established by the Railway Labor Act in an effort to obviate the constant industrial strife which prevailed when the only alternatives for resolving such matters were economic warfare or vexatious and prohibitive litigation.

The immediate question involved is that of determining the status of an organization under Section 2, Eleventh (c) of the Railway Labor Act, when membership in such organization is relied upon to exempt an employee in engine, train, yard or hostling service from the requirement of membership in the organization which represents his craft or class. More specifically, the adequacy of the administrative method provided by the statute for establishing such status, and the availability of resort to court action for such determination, are among the questions involved. And, as an outgrowth of the consideration of these problems by the court below, grave doubt has been cast upon the future effectiveness of the method prescribed by Congress for expeditious settlement of railroad labor disputes through submission to bi-partisan boards of adjustment.

It is thus apparent that the decision of the court below carries implications reaching far beyond the question of whether the respondent has succeeded in exempting himself from the requirement of membership in the organization which is his certified statutory bargaining representative. The whole statutory scheme of disputes handling through specialized administrative tribunals, with a minimum of intervention by the courts, is jeopardized.

While the parties to the litigation undoubtedly will capably present the specific issues involved in this particular case, we believe that these broader aspects of the prob-

lem justify the independent presentation of the views of an organization which may fairly be said to represent railroad labor as a whole.

Respectfully submitted,

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**BRIEF OF THE RAILWAY LABOR EXECUTIVES'  
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**Preliminary Statement**

The facts involved and the specific questions presented for review will undoubtedly be analyzed in detail in the briefs of the parties, and we shall accordingly refer to them only insofar as may be necessary to a discussion of the broader issues with which we are primarily concerned.

Briefly, the respondent N. P. Rychlik sought to escape the obligation of membership in the Brotherhood of Railroad Trainmen (hereinafter referred to as "B.R.T."), the certified representative of his craft, by reliance upon his membership in another organization, United Railroad Operating Crafts (hereinafter referred to as "U.R.O.C.>").

The union shop agreement between petitioner The Pennsylvania Railroad Company and the B.R.T. provided that the requirement of membership in the latter should not be applicable to employees "... who maintain membership in any one of the other labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service . . .".<sup>1</sup> The agreement further provided for a system Board of Adjustment to handle disputes arising under it. The Board was composed of two members appointed by the Pennsylvania and two by the B.R.T., and the agreement provided that a decision by a majority of the Board should be "final and binding", and that deadlocks would be submitted to a neutral arbitrator to be selected by the National Mediation Board, "whose decision as to whether or not the employe has complied with the provisions of this agreement shall be final and binding." (R. 15-16.)

The System Board held that respondent's membership in U.R.O.C. did not constitute compliance with the Union Shop Agreement (R. 17-18), and he was accordingly discharged from his employment in accordance with the terms of the agreement.

Although various contentions were advanced by respondent in his complaint attacking the legality of his discharge, our primary concern is with the points dealt with by the Court of Appeals below, and the issues presented by the petitioners here. As we understand its ruling, the court below has held that the District Court should have entertained jurisdiction of the case on the merits, and made its independent determination of whether respondent's membership in U.R.O.C. complied with the Union Shop Agreement, because (1) the machinery provided in Section 3,

---

<sup>1</sup>The language of the agreement paraphrases that of Section 2, Eleventh (c) of the Railway Labor Act.

First (f) of the Railway Labor Act was not an adequate remedy by which respondent might seek to establish that U.R.O.C. was an organization in which membership would exempt him from the requirement of membership in B.R.T., and (2) the decision of the System Board as to the status of U.R.O.C. could not preclude judicial review of the question because of presumptive bias resulting from the make-up of the board.

The principles thus espoused by the court below are a source of great concern to the Railway Labor Executives' Association, on whose behalf as *amicus curiae* this brief is presented, and to its affiliated organizations. The overall holding, we believe, carries with it such a potential of continuing and harassing litigation as to seriously threaten the practicability of enforcing union security agreements in the railroad industry; and the second aspect of the decision noted above beclouds the future of the whole concept of final and binding settlement, by expert administrative tribunals, of the "minor disputes" which, prior to the establishment of adjustment board machinery, had been a major source of strife in the industry.

We believe that the court below erred on both aspects of its holding. But we also feel that if it had been decided, correctly as we contend, that the proceeding specified in Section 3, First (p) was the proper and exclusive method for establishing the status of U.R.O.C., then the second and perhaps more disturbing aspect of the holding, dealing with reviewability of the System Board's decision, might well have been obviated or at least greatly simplified. We shall accordingly discuss first the question of the method for determining an organization's status within the meaning of Section 2, Eleventh (c) of the Railway Labor Act (the "national in scope" issue), and in the light of that discussion will then refer to the question of the necessity

for and scope of judicial review of adjustment board awards.

### **SUMMARY OF ARGUMENT**

Stated in summary form, the propositions which will be argued in this brief are as follows:

I. In Section 3, First (f) of the Railway Labor Act, an administrative procedure is provided for settling disputes over the status of a labor organization as national in scope and organized in accordance with the Act, within the meaning of Section 2, Eleventh (c). Such procedure is the exclusive method for settling such disputes. It complies with the requirements of fair play in the composition of the tribunal provided for and the procedure to be followed.

No individual rights are contravened by a construction of the statute as permitting execution of union security agreements which limit the employee's choice of union membership to either the certified bargaining agent, or an organization which has established its "national in scope" status by a Section 3, First (f) proceeding. Such construction will conform to the general legislative objective of minimizing litigation and providing expeditious administrative handling of railroad labor disputes, and will benefit rather than harm individual employees by affording complete assurance as to the status of organizations which they may contemplate joining in lieu of the certified bargaining agent.

II. There is no justification for departure from the usual standards of finality of the decisions of administrative tribunals, in the case of a finding by an adjustment board on the purely ministerial inquiry as to whether a particular organization has qualified itself, through resort to



the Section 3, First (f) procedure, as being national in scope and organized in accordance with the Railway Labor Act. It is not here suggested that U.R.O.C. ever qualified through such procedure. As to organizations which may have done so, a board's finding that they had *not* so qualified could be remedied within the confines of the limited review accorded decisions of such tribunals upon a showing of fraud or other gross irregularity.

### **ARGUMENT**

#### **I. THE RAILWAY LABOR ACT PROVIDES AN ADEQUATE AND EXCLUSIVE ADMINISTRATIVE PROCEDURE FOR ESTABLISHING THE STATUS OF AN ORGANIZATION AS NATIONAL IN SCOPE AND ORGANIZED PURSUANT TO THE ACT.**

##### **The Procedure Established and its Adequacy.**

As we understand the reasoning of the decision below, the finding of jurisdiction in the District Court to review the System Board's decision against respondent is predicated upon the absence of any adequate alternative administrative procedure for securing a determination of the status of U.R.O.C. If the court below erred in this conclusion, as we believe it did, then the other phase of its ruling, with respect to presumptive invalidity of the System Board's finding, and the availability of court review on the merits, is without foundation.

When Congress adopted the 1951 amendments to the Railway Labor Act (Section 2, Eleventh) which removed the previous statutory prohibitions against union shop agreements (Section 2, Fourth and Fifth), it imposed certain conditions upon the validity of such agreements, including those set forth in Section 2, Eleventh (c) with which we are here concerned. The paragraph in question provides in part as follows:

"The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; . . . ."

The purpose of this provision was to meet a problem that would otherwise confront employees in the so-called operating crafts, where seniority may be held in two different crafts, and employees are moved from one craft to another with considerable frequency, due to fluctuations in the requirements of the service. Absent such a condition in the union shop agreements, an employee might find himself forced either to change his union affiliation each time he was moved from one craft to another, or to maintain continuous membership in two organizations. This problem is for the most part unique to the operating employees, and no similar condition was imposed with respect to union shop agreements in the non-operating classes.<sup>2</sup>

The language of the above-quoted portion of Section 2, Eleventh (c), describing the organizations in which mem-

<sup>2</sup>Subparagraph (c) was added to Section 2, Eleventh after the bill proposing the union shop amendment had reached the floor of the Senate, no such condition having been included when the amendment was before the Congressional committees. It was offered on the floor on December 7, 1950, by Senator Hill (96 Cong. Rec. 16260, 81st Cong. 2nd Session), and replaced a proposal which the Senator had offered on September 23, 1950 (96 Cong. Rec. 15735, 81st Cong. 2nd Session) to meet the same problem. On both occasions Senator Hill explained the peculiar situation of the operating employees which the condition was designed to meet, and he informed the Senate that the last amendment, containing the language which was finally adopted, had been agreed to by the railroad labor organizations. There appears to have been no discussion of the question of the proper procedure for establishing the status of an organization as national in scope within the meaning of paragraph (c).

bership would satisfy a contractual requirement of union membership, is substantially the same as that used in Section 3, First (a) of the Act in specifying which organizations would be entitled to participate in the selection of the labor members of the National Railroad Adjustment Board —i.e., "... such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act." And in Section 3, First (f), Congress specifically provided for a fair and expeditious method of settling any dispute as to whether an organization met those qualifications. We submit that there is no reasonable basis for the conclusion that where the same qualifications were specified in another, subsequently enacted provision of the statute, Congress intended that some different procedure than that already provided for should be followed in establishing the existence of those qualifications.

In arriving at such a conclusion, the court below in no way questioned the essential fairness of the Section 3, First (f) procedure,<sup>3</sup> but based its decision to a large extent upon what is, to us, the completely inexplicable and erroneous view that Section 3, First (a) established a different, more extensive, set of qualifications than those specified in Section 2, Eleventh (c). Thus, the court said (R. 42-43):

"... when a union applies to be chosen as an elector there are other conditions that it must satisfy besides being 'national in scope' . . . . As we read Sec. 152, Eleventh; (c), their jobs are dependent *only upon whether the 'competing' union is in fact 'national in scope'* . . . ." (Empha is supplied.)

<sup>3</sup>Two stages of this procedure are specified, being first, submission of the matter to the Secretary of Labor who decides in the first instance whether in his judgment the claim has merit, and second; if the Secretary decides that it has merit, a final and binding decision by a board of three members, one to be appointed by the organizations which have already qualified to participate in the Adjustment Board machinery, one by the organization seeking to become qualified, and the third or neutral party to be designated by the National Mediation Board.

The fact is, of course, that Section 2, Eleventh (c) describes the qualifications in the following language: "... labor organizations national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services ...". Section 3, First (a) describes the qualifications for participation in the Adjustment Board machinery as follows: "... such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act." Clearly the latter paragraph provides for no qualifications over and above those specified in the former.<sup>4</sup>

We can only submit that the court's reading of Section 2, Eleventh (c) was inaccurate, and that on the face of the statute it calls for the same qualifications, no more and no less, as those specified in Section 3, First (a).

### **No Individual Rights Jeopardized**

In addition to its conclusions with respect to the adequacy of the Section 3, First (f) procedure, discussed above, the court below rejected it as an exclusive method of establishing the status of an organization under Section 2, Eleventh (c) on the ground that it might not be readily available as an "adequate remedy" to the individual employee, and that "the Act should be construed to grant them the personal privilege of proving their right before an impartial tribunal." (R. 43.)

The repeated references of the court below to rights

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<sup>4</sup>It would appear that the court below may have been misled, in its consideration of the qualifications prescribed by Section 3, First, by the fact that it directed its attention to subparagraph (f), which prescribes the administrative machinery for settling disputes over an organization's qualifications, instead of to subparagraph (a) which specifies the qualifications themselves. Thus the phrase "otherwise properly qualified to participate in the selection of the labor members", with which the court was concerned (R. 43), appears in the last sentence of subparagraph (f), and can only have reference to the "national in scope" requirement of subparagraph (a).



and remedies of the individual employee are not supported by any clear specification of the source of such individual rights in connection with the matter at issue. But we think it is clear that the 1951 amendments to the Act, designed to remove *pro tanto* certain pre-existing statutory prohibitions against union security agreements, were not intended to create individual rights of the sort envisaged by the lower court. In other words, there is no basis for assuming that the individual employee's rights are jeopardized if he himself is not permitted to initiate proceedings looking towards the qualification, under Section 2, Eleventh (c), of an organization which he wishes to join instead of his certified bargaining agent.

As we view it, the individual's right, if there be such, is simply to be exempt from the requirement of membership in the organization holding the union shop agreement if he is a member of another organization *which already has established* its qualifications under Section 2, Eleventh (c). And since the statute itself is the source of this right of exemption, we cannot share the view of the court below that the existence of the right compels a construction of the Act which would enlarge the scope of the exemption to include membership in an organization as yet unqualified, but which the individual hoped to be able to establish as qualified through some future procedure or litigation.

No constitutional questions were raised in the complaint or made the basis of the decision below. In the case of *Pigott v. Detroit, Toledo & Ironton Railroad Company*, 221 F. (2d) 736, cert. den. 350 U.S. 833, where the same questions were involved and decided contrary to the ruling of the court below, the Court of Appeals for the Sixth Circuit stated (p. 742) that no substantial constitutional question was presented, and that there was no abuse of discretion by the District Court in denying a belated motion to raise constitutional questions and have them decided by a



three-judge court. Moreover, the absence of any constitutional obstacle would seem to be established by this Court's recent decision in *Railway Employees' Dept., A.F.L. v. Hanson*, .... U.S. ...., 100 L. Ed. (Adv.), p. 633. In this connection, it might be pointed out that the conditions imposed by Section 2, Eleventh (c) are limited to the specified operating crafts, no such exemption from the requirement of membership in the contracting union having been afforded the non-operating groups such as those involved in the *Hanson* case.

Finally, it should perhaps be noted that what is really at stake here is not any "right to work" or freedom from discharge on the part of the individual. Respondent's decision to terminate his membership in the B.R.T. was purely voluntary on his part. He elected to take his chances as a member of U.R.O.C. even though it had not qualified under Section 2, Eleventh (c). The fact that he may have relied on ultimately obtaining a ruling that the courts had jurisdiction to decide on the status of U.R.O.C. under that provision, does not compel a decision upholding such jurisdiction.

As the District Court pointed out in *Alabaugh v. Baltimore & Ohio R.R. Co.*, 125 F. Supp. 401 (aff'd 222 F. (2d) 861; cert. den. 350 U.S. 831), respondent "gambled heavily" by voluntarily terminating his membership in the B.R.T. He need not have done so. As the District Court pointed out in the *Pigott* case, he should have insisted that U.R.O.C. establish its status without question, or have protected his interests by retaining his membership in the B.R.T. (See *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. at p. 956.) He could still have joined U.R.O.C. without jeopardizing his position so long as he did not forfeit the protection of Section 2, Eleventh (a) of the statute by failing to tender his dues and uniformly required assessments to the B.R.T.

### Withdrawal of Railroad Labor Disputes from the Courts.

This court has long recognized the overall Congressional policy favoring the withdrawal of labor disputes in the railroad industry from the arenas of court litigation, and the substitution therefor of specialized administrative tribunals for disposing of disputes with a minimum of delay and expense. The policy was aptly summed up in the case of *General Committee, B.L.E. v. Missouri-K.-T.R. Co.*, 320 U.S. 323, where the Court said:

"Congress has been highly selective in its use of legal machinery . . . . The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (P. 333.) . . .

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals." (P. 337.).

We have here a case where Congress has provided a particular administrative procedure as described in Section 3, First (f) of the Act. The situation is similar to that under consideration in the companion cases of *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, and *Order of R. C. of A. v. Southern R. Co.*, 339 U.S. 255, where it was held that the creation of the National Railroad Adjustment Board operated to withdraw from the courts jurisdiction over the "minor disputes" which had been placed within the Board's jurisdiction. The same considerations compel the conclusion that the courts are precluded from exercising jurisdiction over the instant dispute by the existence of administrative machinery created to resolve the specific questions presented.

The chaotic situation that would prevail if these questions were left to the courts is not difficult to envisage.

The situation of the individual employee, for whom the court below expressed such concern, would be far more tenuous if he had to rely on being able to establish the status of the organization whose qualifications were questioned by successful prosecution of a court action, instead of acting on the secure knowledge that would follow a Section 3, First (f) procedure establishing on a national level its right to participate in the administrative procedure of the National Railroad Adjustment Board. A court decision would necessarily be a temporal thing, declaring the status of the organization only upon the basis of evidence as to the current situation of the organization with respect to the number of its members and their geographical distribution, contracts held and other activities conducted by it, and such similar factors as a court might consider. Such factors can and do change from month to month and year to year. Ordinary principles of *res judicata* would not make last year's court decision controlling in this year's suit brought by another employee or group of employees; and of course various courts, proceeding on the records made before them, could and probably would arrive at conflicting decisions regarding an organization's status at any given time. By contrast, eligibility to participate in the Adjustment Board machinery, once established, would continue until challenged and disaffirmed by a subsequent Section 3, First (f) proceeding, and could be relied upon by employees of all railroads throughout the country.

Such stability would similarly inure to the benefit of carriers and unions by enabling them to administer union shop agreements without being subjected to the continuing litigation that would inevitably attend adoption of the principles announced by the court below.

Another anomalous situation was suggested, and left without satisfactory solution, by the Court of Appeals itself, when it considered the possible effect of court decisions in actions such as this upon the rights of an organization under Section 3, First (a) to participate in the Adjustment Board machinery. (R. 43-44.) Surely confusion would be rampant should different conclusions be reached by the courts and the tribunals specified in Section 3, First (f), on the question of whether a particular organization was national in scope.

With the well-established Congressional policy of keeping litigation in the railroad labor field at a minimum, the absence of expression from Congress that disputes such as this should be submitted to the courts, the provision in the statute of administrative machinery specifically designated for their handling, and the advantages to all concerned of such administrative handling, we submit that the only reasonable conclusion to be reached is that the administrative procedure is the exclusive method for settling these disputes and that the courts are without jurisdiction.

## **II. THERE IS NO BASIS FOR DEPARTURE FROM THE USUAL STANDARDS OF ADMINISTRATIVE FINALITY IN THE CASE OF AN ADJUSTMENT BOARD FINDING AS TO WHETHER AN ORGANIZATION HAS ESTABLISHED ITS STATUS IN A PROCEEDING UNDER SECTION 3, FIRST (F).**

As is evident from the cases that have been and undoubtedly will be cited to the Court and analyzed by the parties, there has been considerable disagreement as to whether the courts, adjustment boards, system or national, or the board of three provided for by Section 3, First (f), should be resorted to in establishing a union's qualifications under Section 2, Eleventh (c). In the foregoing portion of this brief we have shown that the board of three is

the proper and exclusive tribunal for determination of these matters. We have also pointed out that it is not until after the board of three has acted, and the organization's eligibility<sup>2</sup> to participate in the National Board's administrative machinery has been established, that the individual employee may utilize his membership in that organization to exempt himself from the requirement of membership in the contracting union.

Under these circumstances, it is apparent that the basis for the concern of the court below over the availability and scope of judicial review of the System Board's decision against respondent, and the effect thereon of the presumptive bias which the court felt resulted from the Board's make-up, largely disappears.

In the first place, as a practical matter we doubt whether a system board would ever be presented with a case where the contracting union would seek a ruling that membership in another organization, which had in fact successfully established its status in a Section 3, First (f) proceeding, failed to exempt the employee from the requirement of membership in the contracting union. However, should such a case arise, it is clear that the function of the system board would be the purely ministerial one of inquiring as to whether a Section 3, First (f) proceeding had taken place and resulted in a finding that the union in question was qualified. Such a limited function would leave no room for the operation of bias on the part of the system board even if it were presumed to be present. And finally, in the unlikely event of a system board's refusal to admit the fact of qualification which actually had been so established, its decision could unquestionably be set aside, for fraud or collusion or lack of jurisdiction in the system board, without doing any violence to the doctrine of admin-

<sup>2</sup>Once established, we think it immaterial for purposes of the question here involved whether the organization elects to exercise such eligibility.



istrative finality as applicable to adjustment board awards, and without requiring the reviewing court to make any independent determination on the merits of the question.

As far as this particular case is concerned, it is of course true that the system board, confronted with the absence of any Section 3, First (f) procedure establishing the qualifications of U.R.O.C., should not have undertaken independently to pass on those qualifications. But at most such action was superfluous since in the absence of a Section 3, First (f) procedure, respondent's membership in U.R.O.C. would not entitle him to the exemption of Section 2, Eleventh (c) and the corresponding provision of the union shop agreement."

Admittedly there are complicated questions with respect to the reviewability of adjustment board awards, both system and national, and the extent to which they may be made final and binding on the parties, which this Court has not had occasion to answer. (See, for example, *Whitehouse v. Illinois C. R. Co.*, 349 U.S. 366, and *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235, aff'd. by divided Court at 319 U.S. 732.) But those questions, though of great importance, are not presented here, and we believe that any attempt at the lengthy analysis required for their adequate presentation would unnecessarily complicate the issues in this case and should be reserved for such time as they are brought before the Court for decision.

### CONCLUSION

This case involves an attempt to obtain judicial decision of a question in the face of Congressional action providing a specific administrative procedure for determination of precisely the same question. Such a result would run counter to the recognized Congressional policy of keeping litigation at a minimum in the railroad labor field. The administrative procedure is adequate and fair, and no in-

dividual rights would be impaired by holding it to be exclusive. Such a conclusion would remove an otherwise chaotic condition, and enable all parties concerned to act with secure knowledge of their rights and liabilities. And it would raise no questions of the validity and reviewability of awards of the bi-partisan boards of adjustment long established for handling minor disputes in the railroad industry, such as the problems to which the Court of Appeals below was led by its conclusion that the statutory administrative procedure was inadequate.

Respectfully submitted,

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Dated at Toledo, Ohio, this  
28th day of September, 1956.

**CERTIFICATE OF SERVICE**

I, Richard R. Lyman, one of the attorneys for the applicant Railway Labor Executives' Association, do hereby certify that on the . . . . day of September, 1956, I served the attached motion for leave to file brief as amicus curiae and brief of amicus curiae upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to John B. Prizer and Richard N. Clattenburg, 1740 Suburban Station Building, Philadelphia 4, Pennsylvania, and Percy R. Smith, 705 Walbridge Building, Buffalo 2, New York, attorneys for petitioner Pennsylvania Railroad Company; Henry Kaiser and Eugene Gressman, 1701 K. Street, N.W., Washington, D.C., Harold J. Tillou, 701 Erie County Savings Bank Building, Buffalo, New York, and Wayland K. Sullivan, 1370 Ontario Street, Cleveland 13, Ohio, attorneys for petitioner Brotherhood of Railroad Trainmen; and Meyer Fix and Norman Spindleman, 500 Powers Building, Rochester 14, New York, attorneys for respondent N. P. Rychlik.

Richard R. Lyman

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 56

PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD  
OF RAILROAD TRAINMEN, PETITIONERS

v.

N. P. RYCHLIK, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS  
CURIAE

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## OPINIONS BELOW

The opinion of the District Court (R. 22) is reported at 128 F. Supp. 449. The opinion of the Court of Appeals (R. 39) is reported at 229 F. 2d 171.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1956 (R. 44). The petition for a writ of certiorari was filed on April 4, 1956, and was granted on May 14, 1956 (R. 45). 351 U. S. 930. The Court, in granting a writ of certiorari, invited the Solicitor General to file a brief as *amicus curiae* (*ibid.*).

## QUESTION PRESENTED

Section 2, Eleventh (a) of the Railway Labor Act authorizes any railroad and any labor organization duly designated as a representative of its employees to make an agreement requiring as a condition of continued employment that all employees become members of the labor organization representing their craft or class. Subsection (c) of Section 2, Eleventh provides that, in the case of operating employees, such membership requirement shall be satisfied if an employee is a member of any labor organization, "national in scope" and "organized in accordance with this Act," which admits members of his craft.

The question in the case which the United States will discuss is whether the unions to which subsection (c) refers are only those entitled to participate, pursuant to Section 3 of the Act, in selecting the employee members of the National Railroad Adjustment Board.

## STATUTE INVOLVED

The relevant provisions of the Railway Labor Act (44 Stat. 577, as amended, 45 U. S. C. 151 *et seq.*) are set forth in Appendix B, *infra*, pp. 23-26.

## STATEMENT

In passing Section 2, Eleventh of the Railway Labor Act in 1950 (45 U. S. C. 152, Eleventh, 64 Stat. 1238), Congress lifted the prohibition against union shop agreements which had been inserted in the Act in 1934 (Section 2, Fourth and Fifth, 48 Stat. 1186). Subsection (c) of Section 2, Eleventh, however, provides that the union membership requirement of any

union shop contract shall be satisfied as to any operating employee if he belongs to "any of the labor organizations, national in scope, organized in accordance with this Act" which admits members of his craft.

The Pennsylvania Railroad and the Brotherhood of Railroad Trainmen (the Brotherhood), bargaining representative for respondents, negotiated a union shop agreement in March, 1952, which incorporated the statutory limitations of coverage found in subsection (c). Shortly after, respondents resigned their memberships in the Brotherhood and became members of the United Railroad Operating Crafts (UROC) which they allegedly believed to be a union "national in scope." After being cited for non-compliance with the Brotherhood's union shop agreement, respondents received a hearing before their System Board of Adjustment,<sup>1</sup> but decision was postponed pending that Board's conclusive determination as to whether UROC was in fact national in scope. Respondents subsequently joined the Switchmen's Union of North America (the status of which as a union "national in scope" is undisputed) and applied unsuccessfully for readmission to the Brotherhood. The System Board later determined that membership in UROC did not constitute compliance with the union shop agreement (R. 17-18) and respondents' notice

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<sup>1</sup> Section 3, Second, permits the establishment by mutual agreement of system, group or regional boards of adjustment to act in place of the National Railroad Adjustment Board. The instant carrier and the Brotherhood established such a System Board to resolve disputes arising under the union shop agreement, two of its four members to be selected by the Brotherhood and two by the carrier (R. 15).

of discharge (R. 18) based upon this determination followed.

In their complaint filed in the district court (W. D. N. Y.) respondents alleged that their discharge was in violation of Section 2, Eleventh, and charged that the System Board's determination could not be considered final and binding since the Brotherhood, which selected half of the Board's members, had been acting simultaneously as "accuser, [prosecutor], judge and jury \* \* \*" (R. 8).

The district court granted the present petitioners' motions to dismiss for failure to state a cause of action and for lack of jurisdiction. The court held that the question whether the present respondents had complied with the union shop agreement by maintaining their memberships in properly qualified unions "was one for the proper determination in the first instance by the System Board of Adjustment" and that the composition of the Board did not, *per se*, invalidate that portion of the agreement giving it jurisdiction to resolve disputes arising under the union shop contract. The court refused, itself, to review the status of UROC on the ground that adequate administrative procedures for determining this status existed under Section 2, Ninth<sup>2</sup> and Section 3.<sup>3</sup>

<sup>2</sup> This section appears to be plainly inapplicable since it deals with procedures before the Mediation Board in disputes between rival bargaining representatives of a particular craft.

<sup>3</sup> Section 3, First (f) provides for the resolution of disputes arising as to right of any "national labor organization" to participate in the election of labor members of the National Railroad Adjustment Board. Under this procedure, the labor organization makes the claim and if the Secretary of Labor finds merit in the

The Court of Appeals for the Second Circuit reversed and remanded to the district court for review of the System Board's decision that UROC was not national in scope. The court found that subsection (c) conferred on operating employees subject to union shop contracts a right to satisfy the union membership requirement of such contracts by belonging to any union that is, in fact, national in scope and organized in accordance with the Act (R. 43). The court held that while the System Board had jurisdiction over disputes between the union and its members (citing *UROC v. Wyer*, 205 F. 2d 153), its decision here was subject to review because of the presumed bias in a tribunal half of whose members have active interests in direct conflict with those being asserted. The court held that respondents were entitled to judicial review because the administrative remedy of Section 3, First (f) (see note 3, *supra*), provided inadequate relief for an employee asserting his rights under Section 2, Eleventh (c). The principal reasons were that unions must fulfill requirements other than being "national in scope" to qualify as Adjustment Board electors; that the special board of three provided for in Section 3, First (f) could rule on a union's status as an elector without deciding whether it is "national in scope"; and that only the union and not an individual claimant, he directs the Mediation Board to call a panel of three members—one designated by already qualified unions, one by the claimant union, and a neutral designated by the Mediation Board. This special board of three decides whether the claimant " \* \* \* was organized in accordance with section 2 and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board."



vidual employee could invoke and pursue this remedy (R. 42-44).

### ARGUMENT

This is the second time a federal court has been asked to review an administrative determination that a labor organization is not within the meaning of Section 2, Eleventh (c) of the Railway Labor Act.<sup>\*</sup> The opinion below rests on the assumption that the statute guarantees to each operating employee an absolute right to refrain from joining the union designated as bargaining representative of his craft, so long as he maintains membership in any other labor organization that is, as a matter of fact, "national in scope" and "organized in accordance with this Act." In the one other direct decision on this point, *Pigott v. Detroit, Toledo and Ironton R. Co.*, 221 F. 2d 736, the Court of Appeals for the Sixth Circuit at least tacitly assumed the existence of this right and the dissenting opinion rests squarely on such an assump-

<sup>\*</sup> Where railroad employees, threatened with discharge under union shop agreements, have sought judicial relief before resorting to any administrative procedure the courts have uniformly held that the status of the alternate union involves a question of interpreting and applying a collective bargaining agreement, and hence falls within the exclusive primary jurisdiction of either the National Railroad Adjustment Board or a System Board. *UROC v. Wyer*, 115 F. Supp. 359, affirmed 205 F. 2d 153 (C. A. 2), certiorari denied 347 U. S. 929; *Alabaugh v. B. & O. R. Co.*, 125 F. Supp. 401, affirmed 222 F. 2d 861 (C. A. 4); *UROC v. Penn. R. Co.*, 212 F. 2d 938 (C. A. 7), certiorari denied 347 U. S. 929; *Johns v. B. & O. R. Co.*, 118 F. Supp. 317 (3 judge court), affirmed 347 U. S. 964; *Bohnen v. B. & O. Chicago Term. R. Co.*, 125 F. Supp. 463 (N. D. Ind.); *UROC v. Nor. Pac. Ry. Co.*, 208 F. 2d 135 (C. A. 9), certiorari denied 347 U. S. 929.

tion.<sup>5</sup> If it is assumed that such a "right" exists, the only issue is whether the administrative procedures of Section 3 provide an employee with a proper tribunal for determining if his alternative union, in fact, meets these requirements: The Court below held that the tribunal provided in Section 3 was not proper; the Court of Appeals for the Sixth Circuit held that it was.

The United States submits that the questions of remedy and of jurisdiction do not arise in this case for the reason that UROC, on the facts standing admitted, is not within the meaning of Section 2, Eleventh (c) as a matter of law. In our view the individual employee is given no "right" to avoid his union shop membership requirements by belonging to alternative unions. The "right" implicit in subsection (c) is conferred instead on the qualified operating unions themselves. This is the right to offer

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<sup>5</sup> "Their right not to be deprived of [their livelihood] \* \* \* if U. R. O. C. comes within the classification of Section 152, Eleventh, (c) is a valid statutory right \* \* \*. It is a right which should be protected by the examination of a court." 291 F. 2d at 743:

<sup>6</sup> Having found the System Board biased, the court below held that the special three-man board procedure of § 153, First (f) was an inadequate remedy since:

"\* \* \* we can see no justification for forcing them to accept that union as a surrogate to assert their right \* \* \* their jobs are dependent only upon whether the 'competing' union is in fact 'national in scope'; and the Act should be construed to grant them the personal privilege of proving their right before an impartial tribunal \* \* \*." (R. 43); "\* \* \* there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law." (R. 44).

protection from the requirement of dual unionism to those of its members who are working in a craft for which another union has been designated bargaining representative but who desire to keep their membership in the union possessed of this "right". This right is not possessed by any labor organization that may be, as a matter of fact, "national in scope" but only by those unions which have qualified as "national in scope and organized in accordance with Section 22" for the purpose of electing labor members of the National Railroad Adjustment Board under Section 3 of the Act. We thus urge that the statute be interpreted as it was by the district court in the *Pigott* case, 116 F. Supp. 949 (E. D. Mich.):

Under the Act, plaintiffs are not entitled to their seniority or their employment unless they belong either to the Brotherhood or to another union which has qualified, pursuant to the procedure provided in Section 153 for the exception to the union shop requirement. Since the complaint fails to allege that U. R. O. C. has so qualified, plaintiffs' membership in that labor organization does not preserve any right, the protection of which justifies the intervention of this Court. 116 F. Supp. at 957-958.

If subsection (c) stated simply that the requirement of membership shall be satisfied by membership in "any other labor organization national in scope," the plain meaning of such language might require the interpretation placed on it by the court below. See *Ex Parte Collett*, 337 U. S. 55, 61; *Packard Motor Car Co. v. National Labor Relations Board*, 330 U. S.

485, 492. But the language adopted in the statute is more extensive than that:

The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to [operating employees] \* \* \* if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said [operating] services.

To give meaning to this expanded language, and to determine what labor organizations were intended to be included, it is not only appropriate but necessary to refer to other sections of the Act and to the legislative history of subsection (c) itself. *United States v. American Trucking Associations*, 310 U. S. 534, 544.

1. Almost the identical language is found in Section 3 of the Act, establishing the National Railroad Adjustment Board. Section 3, First (a) provides that half of the Board's thirty-six members shall be selected "by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of this Act." Disputes over the application of this language to particular unions were left to the special administrative machinery established in subsection (f) of Section 3, First (see note 3, *supra*).<sup>7</sup>

<sup>7</sup> At least one aspect of the words "organized in accordance with" Section 2 of the Act is that the union be freely organized, as distinguished from company dominated. The Secretary of Labor, in three cases arising under the procedure of Section 3, First (f),



This solution is consistent with the general purpose underlying the Railway Labor Act to provide effective administrative remedies for the adjustment of labor disputes in the railroad industry. See *Slocum v. Del., L. & W. R. Co.*, 339 U. S. 239, 249. That the general objective applies with equal force to disputes arising under Section 2, Eleventh of the Act is made clear by the views expressed by the National Mediation Board in a letter addressed to the Solicitor General, set forth in the Appendix, *infra*, at pp. 19-22. Thus, the district court in the *Pigott* case, having considered the similarity of language and purpose, found "a compelling inference that, when the identical qualifications of Section [3] were incorporated into Section [2], Eleventh, the drafters of this amendment also had the administrative procedure of Section [3] for determining these qualifications clearly in mind." 116 F. Supp. 949 at 952. In other words, until a labor organization meets the requirements of Section 3—and where there is a dispute, resolves it through the machinery of Section 3, First (f)—it is not the kind of labor organization to which Section 2, Eleventh (c) refers, and an employee is only protected from the membership requirements of a union shop agreement when he belongs to a labor organization which has qualified to participate in National Adjustment Board elections.

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equated this statutory provision with "freely organized," and noted in each case that the "freely organized" character of the claimant union was not disputed. U. S. Department of Labor, Decisions of the Secretary, In the Matters of United Transport Service Employees of America (January 2, 1947); Brotherhood of Sleeping Car Porters (September 8, 1948); American Railway Supervisors Association, Inc. (September 8, 1953).



2. This interpretation is confirmed by examination of the legislative history of subsection (c). The stated purpose of the bill (S. 3295, 81st Cong., 2d Sess.) that became Section 2, Eleventh—the union shop amendment—was to permit in the railroad industry, as had been permitted by Section 8 (a) (3) of the Taft-Hartley Act in other industries (29 U. S. C. 158 (a) (3)), the negotiation of union shop agreements aimed at ending the “free ride” of unaffiliated employees who were enjoying the fruit of collective bargaining without contributing to its cost. (See Sen. Rep. 2262 and H. Rep. 2811, 81st Cong., 2d Sess.)<sup>\*</sup> But a difficulty peculiar to the railroad industry was revealed in the hearings on the bills. (Hearings, Senate Subcommittee on Railway Labor Act Amendments of Committee on Labor and Public Welfare; Hearings, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess.) Representatives of the operating crafts, while generally supporting the bill, expressed concern over the possibility that a member of one craft union would either have to abandon membership in his union or else carry dual membership when temporarily promoted (or demoted) to work in a craft represented by another union. (Senate Hearings, *supra*, pp. 18–19, 67–68; House Hearings, *supra*, pp. 31–33, 43, 78–82, 192.) Witnesses from the industrial unions, however, testified that this presented no problem for them since in their case all crafts are represented by a single union.

<sup>\*</sup> The bill as approved by both House and Senate contained only subsections (a) and (b) in substantially the same form as is currently in the statute.

(See Senate Hearings, *supra*, p. 97; House Hearings, *supra*, p. 223).

After the Senate bill had been favorably reported, the committee in charge of the bill recommended on the floor an amendment which would add an additional proviso to subsection (a):

*Provided further*, That no such agreement shall require membership in more than one labor organization. 96 Cong. Rec. 15735.

The purpose of this amendment was made explicit when the amendment was offered:

This proviso was attached because some question was raised as to the status, under this bill, of employees who are temporarily promoted or demoted from one closely related craft or class to another. This practice, with minor exceptions, occurs only among the train- and engine-services employees. . . . It is the intention of this proviso to assure that in the case of such promotion or demotion . . . the employee involved shall not be deprived of his employment because of his failure or refusal to join the union representing the craft or class in which he is located if he retains his membership in the union representing the craft or class from which he has been transferred. 96 Cong. Rec. 15736.

No action was taken on this amendment, but three months later a substitute amendment was offered which had been drafted by the railroad brotherhoods. The passage of this amendment, these unions indicated, would make the entire bill acceptable to them. The language of this substitute is that of the present

subsection (c) and passed the Senate following an explanation that the only difference between the brotherhoods' amendment and the earlier committee amendment was that the former "spell out in much more detail the purposes of the committee amendment than did the committee amendment. But the intent and the purpose of the committee amendments and the amendments now before the Senate are exactly the same." 96 Cong. Rec. 16268.

It is evident that the only purpose of the amendment resulting in subsection (c) was to avoid compulsory dual unionism, to protect members of a union representing one craft from being compelled to join another union representing another craft when temporarily working at the other craft. It is equally clear that had the railroad industry been organized on an industrial basis, or had there been less intercraft movement among operating employees (who are the only employees covered by subsection (c)), there would have been no necessity for such a provision and the original bill, containing only subsections (a) and (b) would have passed without it. Such a bill would have permitted the negotiation of standard union shop contracts, such as are presently permitted under the Taft-Hartley Act, under which employees must join the union designated as bargaining representative for their craft or be subject to discharge. Cf. 96 Cong. Rec. 17055-17056.

At no time in the history of its passage was subsection (c) ever intended to provide employees with any blanket "right" to join unions other than the

bargaining representative of their craft, except to meet the particular problem of intercraft mobility among operating employees. If any personal "right" had been intended, there would have been no reason to discriminate between operating employees, who are granted, and non-operating employees, who are denied, the privilege of belonging to alternate unions. Nor is there any suggestion in this legislative history that Congress intended to benefit rising new unions by permitting them to recruit members from among employees who, without the subsection, would be compelled to maintain membership in the bargaining representative. The floor amendment resulting in subsection (c) was thus drafted by and urged by the unions representing the operating railroads and crafts, and was clearly intended to meet the specific problem of intercraft movement. In changing the reference from "any labor organization" to "any one of the labor organizations, national in scope, and organized in accordance with this Act," it is reasonable to presume that the draftsmen of the provision intended to cover the same organizations as were covered by Section 3 from which this language was taken. Since disputes over the status of an organization under Section 3 are resolved by the special three-man-board procedure of Section

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<sup>2</sup> During debate on the bill, Senator Holland specifically asked whether industrial unions, such as the Transport Workers Union (CIO) were within the language of subsection (c). 96 Cong. Rec. 16324-16325, 16331. Proponents of the bill gave no direct answer to this question, but at no point in the debate was any distinction drawn between craft and industrial unions *per se*.

3, First (f), it is equally reasonable to assume that similar disputes over whether a union is within Section 2, Eleventh (c) were intended to be determined by the same mechanism. Only in this way would the same language define the same organizations, regardless of the section of the Act in which the definition is found.

3. The interpretation urged by the Government is underscored when consideration is given to the results that would follow if subsection (c) were interpreted as conferring a *right* upon operating employees to belong to any union, national in scope and organized according to the Act—not as the phrase is used in Section 3 but as federal courts might decide in particular cases.

First—the established unions, principal beneficiaries of the union shop amendment, would be subjected to a burden not contemplated when subsection (c) of the amendment was proposed. If every operating employee had the right to ask a federal court to decide if his alternate union is “national in scope” as an original question in each case, the existing bargaining representatives would be faced with endless litigation. The determination in one circuit, for example, that UROC is national in scope would not be *res judicata* on the question in any other circuit. Similarly a judicial determination that UROC did not qualify on one date would not bar an employee from seeking a ruling—even in the same court—that it was qualified on a different date. Even a decision by this Court that on a particular date UROC is qualified as an alternate union under Section 2 would not preclude the



special three-man Board under Section 3 from finding that it was not qualified to participate in Adjustment Board elections after that date. Similarly, a ruling by the special three-man board that UROC is not qualified to participate in Board elections would not preclude an employee from seeking to have the identical issue determined by a federal court under Section 2, Eleventh (c).

Second—the employees, fully as much as the brotherhoods, would be injured by this interpretation. Under the interpretation which we think correct—that only organizations qualified to participate in Adjustment Board elections are covered by subsection (c)—an employee will always know or can easily ascertain the unions to which he may belong as an alternative to his bargaining representative, namely, the current Adjustment Board participants. A new union, such as UROC, would have to seek certification as an elector by the procedure of Section 3, First (f) before it could qualify. This ruling would be prospective, uniform nationally, valid until withdrawn by the same procedure, and, most important, would be the ruling of an administrative body established to decide precisely this question. Thus, the decision below, while apparently protective of the employee, in reality would force him to resort to expensive and uncertain judicial procedures in order to belong to an alternate union. Even a certification by a special three-man board under Section 3 would be no absolute assurance that the union would also qualify under Section 2, Eleventh (c).

On the other hand, under our interpretation a union such as UROC which has not yet qualified as an elector under Section 3 suffers from a disadvantage vis-a-vis rival qualified brotherhoods that would not exist under conventional union shop agreements. The effect of subsection (c), as we believe it should be interpreted, is that when UROC is elected bargaining agent for a craft on a particular railroad, it may not compel members of a rival brotherhood to become dues-paying members of UROC, as it could if the subsection did not exist. When the brotherhood becomes the bargaining agent on that railroad, however, UROC members are compelled to join the brotherhood to retain their jobs. Consequently, when UROC is the "out" union, its members must pay dues to two unions in order both to keep their jobs and to continue supporting UROC, while members of the brotherhood, when it is the "out" union, can satisfy any union shop agreement—including ones negotiated by UROC—by maintaining their membership in the brotherhood alone.

Congress apparently concluded however that this comparative disadvantage was outweighed by the serious confusion, a potential source of strike-producing friction, that would result if subsection (c) were interpreted as conferring a judicially enforceable right on individual employees. UROC may at any time have this disadvantage removed by becoming a qualified elector under the procedures of Section 3, First (f),<sup>10</sup> thus becoming a labor organization

<sup>10</sup> The possible remedies for any malfunctioning of that administrative machinery are not at issue here.

membership in which will protect an employee from discharge under union shop contracts with the established brotherhoods.

**CONCLUSION**

Since UROC is not a labor organization "national in scope and organized in accordance with this Act" within the meaning of Section 2, Eleventh (c), the decision of the court below should be reversed.

Respectfully submitted.

J. LEE RANKIN,

*Solicitor General.*

VICTOR R. HANSEN,

*Assistant Attorney General.*

FREDERICA S. BRENNEMAN,

*Attorney.*

OCTOBER 1956,

## APPENDIX A

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NATIONAL MEDIATION BOARD,  
OFFICE OF THE CHAIRMAN,  
Washington 25, D. C., September 19, 1956.

Honorable J. LEE RANKIN,  
*Solicitor General of the United States,*  
*Department of Justice,*  
*Washington, D. C.*

DEAR MR. RANKIN: This is in further reply to your office's letter of July 23, 1956, with reference to the order of the Supreme Court granting petition for writ of certiorari in *Pennsylvania Railroad Co., et al. v. Rychlik*, No. 56, Oct. Term 1956.

Your letter states "The case presents questions as to the jurisdiction of a federal district court to review the merits of a decision of a System Board of Adjustment established pursuant to Section 3, Second, of the Railway Labor Act", and invited the views of this Board as to the policy considerations pertinent to the questions presented. It is from this point of view we are writing.

When Congress in 1934 amended the Railway Labor Act and provided for the establishment of the National Railroad Adjustment Board and for system and regional adjustment boards, it was making an effort to provide machinery to correct the then existing serious situation which was affecting the harmonious relations between management and labor in the railroad industry. At that time there was a substantial backlog of grievances, disputes concerning the

interpretation and application of collective bargaining agreements on the several railroads of the country. It is axiomatic to say that the prompt settlement of grievances is necessary to preserve good relations between the carriers and their employees. The failure to settle such may lead, and has led, to disturbances interfering with the transportation system of the country. Unfortunately, through the past twenty years, there has slowly been built up on the First Division of the National Railroad Adjustment Board a large backlog of cases. For several years this backlog has been in the neighborhood of approximately 3,000 cases, which represents a minimum of five years backlog based on the Board's normal productivity.

Because of this backlog on the First Division, organizations have been reluctant to take their cases to the Division and have sought a solution to the settlement of the grievance disputes by incorporating them into strike dockets. While the Railway Labor Act provides that disputes referable to the Adjustment Board are not subject to the jurisdiction of the National Mediation Board, nevertheless, in the face of a threatened strike the Board has taken jurisdiction under Section 5, First (b), of the Act. When it has so taken jurisdiction in its effort to settle the dispute, it has urged upon the parties the wisdom of establishing system boards of adjustment. Last year there were 42 such boards which handed down 3831 awards. At the close of the fiscal year June 30, 1956, there were pending and unsettled on the docket of the First Division of the National Railroad Adjustment Board 2958 cases. During the fiscal year ended June 30, 1955, the First Division disposed of 836 cases.

From these simple facts, it is very apparent that the provisions of the Act providing for the establish-



ment of system boards of adjustment, materially contributes to the peaceful adjustment of disputes in the railroad industry. If every case taken to a system board of adjustment is subject to review on its merits in the federal courts, two appalling results will follow. In the first instance, the courts may well be overwhelmed by requests to determine matters which are peculiar to the railroad industry and which an administrative board such as a system board of adjustment is peculiarly equipped to handle; and secondly, if these awards of system boards of adjustment are subject to review on their merits, the tendency will be for the dissatisfied party to seek court review, which will delay a final determination of the dispute. This delay in itself will discourage the parties from taking this kind of dispute to such boards. We hesitate to guess what course of action the organizations would then take to obtain a settlement of their grievances.

It was very obviously the intention of the Congress in enacting the Railway Labor Act, and its amendments in 1934, to provide that the carrier, on the one hand, would be subjected only to dealing with organizations national in scope and, on the other hand, the employees would have the advantage, if they so desired, of organizing themselves into organizations equipped to meet the problems throughout the length of even the largest railroad system. It appears to us that it is to the advantage of both that organizations representing crafts and classes in the railroad industry should in fact be national in scope. This does not prevent, however, any new group being organized. As was pointed out in *Pigott v. Detroit, Toledo & Ironton*, 221 F. 2d 736, there is an adequate method under the provisions of Section 3 of the Act for such group to establish the fact, if it is a fact, that it is national in

scope. If this feature of the law should have some cloud thrown over it, the carrier on the one hand would be confronted with a myriad of small organizations, which in itself would contribute to labor unrest.

We are submitting these observations for your consideration in connection with a brief, as amicus curiae, which you may desire to file in the instant case.

Sincerely yours,

S/ ROBERT O. BOYD,  
*Chairman.*

## APPENDIX B

### STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (44 Stat. 577, as amended, 45 U. S. C. 151 *et seq.*) are as follows:

#### SEC. 2. \* \* \*

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly

required as a condition of acquiring or retaining membership.

\* \* \* \*

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to member-

ship employees of a craft or class in any of said services.

\* \* \* \* \*

SEC. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

\* \* \* \* \*

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in



accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.